

89-897

Supreme Court, U.S.

FILED

DEC 4 1989

JOSEPH F. BRANNON JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KENNETH C. GRIMES
PETITIONER

VERSUS

LOUISVILLE AND NASHVILLE R. CO.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

Date:
12/04/89

Kenneth C. Grimes
621 East Gum Street
Evansville, Indiana 47713
1-812-423-1600
Counsel as Pro Se

EXHIBITS AND APPENDIX INDEX

	Date	Title	Page
A	9/6/89	Den rehear app. ct.(Order)..	1
B	1/27/89	Affirm Dist Ct. Judge. Ct.(Order).....	2-11
C	2/26/89	of Appeal (Notice).....	12-14
D	2/17/88	Den Plt Mo To Vacte Ct. (Order).....	15-17
E	9/15/87	Den Mot To Conf (Order).....	18-25
F	9/18/86	Den Rehear Supreme Ct.(Order)	26
G	6/25/86	Den Rehear Supreme Ct.(Order)	
H	6/23/86	Den Suspend of Effect(Order) Supreme Ct.....	27
I	6/2/86	Order Den Writ of Cert Supreme Ct.....	28
J	4/22/86	Order of Docket, Supreme Ct.....	29
J-I	6/25/85	Order Den Rehearing	30
K	6/12/85	Order Aff Dist Ct. Judge, App. Ct.....	31-3
L	10/18/84	Ammend Notice of Appeal....	35

M	10/12/84	Notice of Appeal.....	34
N	9/14/84	Order Dist Cout. Ret Claim.	36-51
O	4/24/84	Order Interloc Appeal, App. Ct.....	52-53
P	3/9/84	Notice of App.....	54
Q	2/10/84	Order Dist Ct. Final.....	55-92
R	5/6/82	Order Summary Judge Endsley	207-208
S	6/13/79	Award.....	93-98
T	6/11/81	Complaint.....	181-200
U		Art III 2 Const.....	105-100
V		7th Amend Const.....	99
W		45 USCS 153 First (P).....	100-101
X		45 USCS 153 Second.....	101-104
Y	6/11/87	Petition to Confirm.....	107-151
Z	7/9/82	Transcript, of Near Summary	211-212
I	7/2/87	Deft Mot to Dismiss.....	152-153
II	7/16/87	PLT Response.....	157-160
III	4/9/88	PLT Main Appeal Brief.....	161-162

	Page
IV 5/20/88	PLTT Reply Brief..... 167-172
V 2/9/89	PLT Rehear Brief..... 173-177
VI	Exhibit (A) Agreement..... 207-210
VII	Exhibit (B) Docket Entries.
VIII	Exhibit (C) Transcript..... 211-212
IX	Exhibit (D) Award..... 93-98
X	NRAB Decision One 153 (M). 180
XI	Job Abolishment..... 178
XII	Furlough..... 179
XIII	Exhibit F. Affidavit
XIV	Exhibit E. Motion to Confirm
	Exhibit G. Response to Deft
	Motion to strike Jury Demand

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 6, 1989.

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

KENNETH C. GRIMES,	)	Appeal from the
Plaintiff-Appellant,	)	United States
	)	District Court
	)	for the Southern
No. 88-1381 VS.	)	District of Indiana
	)	Evansville Division.
LOUISVILLE & NASHVILLE)	
RAILROAD COMPANY,	)	No. 81-C-130
Defendant-Appellee.	)	Gene E. Brooks,
	)	Judge.

O R D E R

On Consideration of the petition for rehearing filed in the above-entitled cause, the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

JUDGMENT--WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1989.

Before

Hon. RICHARD A POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A MANION, Circuit Judge

KENNETH C. GRIMES,)	
Plaintiff-Appellant,	)	Appeal from the
	)	United States
	)	District Court No.
	)	88-1381
	)	for the
vs.)	
LOUISVILLE AND NASHVILLE	)	Southern District
RAILROAD COMPANY,	)	of Indiana
Defendant-Appellee	)	Evansville Division
	)	No. 81 C 130
	)	Judge Gene E. Brooks

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Indiana, Evansville Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed

from be, and the same is hereby, AFFIRMED,
with costs, in accordance with the order of
this Court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted January 18, 1989*

January 27, 1989.

Before

Hon. RICHARD A. POSNER, Circuit JudgeHon. JOEL M. FLAUM, Circuit JudgeHon. DANIEL A. MANION, Circuit Judge

KENNETH C. GRIMES,	)	Appeal from the
Plaintiff-Appellant,	)	United States
	)	District Court for
	)	the Southern
	)	District of
No. 88-1381	vs.)	Indiana,
	)	Evansville Division.
)	
	)	No. 81-C-130,
LOUISVILLE & NASHVILLE	)	Gene E. Brooks,
RAILROAD COMPANY,	)	<u>Judge</u>
Defendant-Appellee.)	

ORDER

Plaintiff-appellant Kenneth C. Grimes appeals from the district court dismissal, on the basis of res judicata, of his petition to confirm and enforce National Railroad Adjustment Board (NRAB) Award No. 7956. We affirm.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument

would not be helpful to the court in this case. The notice provided that any party might file a "Statement as

I.

On September 21, 1976, Louisville & Nashville Railroad Company (L&N) dismissed Grimes for alleged insubordination. Grimes then initiated a grievance procedure pursuant to an employer-employee agreement negotiated by L&N and the International Brotherhood of Electrical Workers, of which Grimes was a member. On June 13, 1979, the NRAB issued Award No. 7956, which held (1) dismissal was an excessive punishment for Grimes' actions; (2) L&N must reinstate Grimes without impairment to his seniority rights; and (3) Grimes was not entitled to compensation for lost wages and benefits for the three years following his dismissal. L&N then reinstated Grimes as an electrician apprentice. Grimes believed his seniority had been impaired, as his former position was that of an "upgraded" electrician apprentice. He requested arbitration on the matter, but apparently no action was taken. Grimes then filed a charge of racial discrimination against L&N with the Equal Employment Opportunity Commission.

On March 30, 1981, Grimes was furloughed by L&N, as the position he held was abolished. On June 11, 1981, he filed suit in federal court against L&N and his union. His complaint raised four claims with respect to L&N: (1) L&N had breached the collective bargaining agreement during his discharge, reinstatement and furlough; (2) L&N had committed racial discrimination in his dismissal, reinstatement and furlough, and the furlough was invoked in

to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

retaliation for Grimes' filing of charges with the EEOC; (3) L&N conspired to deprive him of his civil rights; and (4) a request for review of the NRAB award denying him compensation for lost wages and benefits. Grimes' prayer for relief also requested that the court direct L&N to comply with the NRAB award and restore his seniority rights and original apprenticeship status. on L&N's summary judgment motion, the court dismissed all four of these claims, with the exception of the claim of retaliation. Grimes v. Louisville & Nashville Railroad Company, 583 F. Supp. 642 (S.D. Ind. 1984). After a trial, the court also dismissed the retaliation claim. Grimes appealed, requesting this court to make a determination on his request for confirmation of the NRAB award. On June 12, 1985, we held that the confirmation issue had been waived for purposes of appeal because Grimes had not raised it adequately at trial. Grimes v. Louisville & Nashville Railroad Company, No. 84 2749 (7th Cir. 1985) (unpublished order).

On June 11, 1987, Grimes filed the present suit for confirmation of the NRAB award plus damages for L&N's alleged noncompliance with that award. The case was assigned to the same district court judge and under the same docket number as his first filing. The district court denied Grimes' claim on the basis of res judicata, imposed sanctions under Rule 11, and dismissed the suit with prejudice. The district court also denied Grimes' motion to vacate its decision. Grimes appeals, claiming his request to confirm and enforce the NRAB award is not barred by res judicata.

Res judicata, or claim preclusion, operates as a bar to litigants when there has been a final judgment on the merits in a prior action, and there is an identity of the cause of action and the parties in the two suits. Lee v. City of Peoria; 685 F. 2d 196, 199 (7th Cir. 1982). The decision in Grimes, 583 F. Supp. 642, was final, on the merits, and between the same parties as this action. The major issue in this case therefore is whether the causes of action in the two suits are the same.

The first suit is conclusive "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Magnus Electronics, Inc. v. La Republica Argentina, 830 F. 2d 1396, 1400 (7th Cir. 1987) (quoting Nevada v. United States, 463 U.S. 110, 129-30 (1983)). Thus, a party cannot split one cause of action or use several theories of recovery to bring separate suits. Shaver v. F.W. Woolworth Company, 840 F.2d 1361, 1365 (7th Cir. 1988). "In determining whether a second suit is engaging in such prohibited 'claim splitting,' courts have sought to discover whether the claims 'arise out of the same basic factual situation.'" Gasbarra v. Park-Ohio Industries, Inc., 655 F.2d 119, 121 (7th Cir. 1981) (quoting Himel v. Continental Illinois National Bank & Trust Company, 596 F.2d 205, 209 (7th Cir. 1979)). This circuit applies the "operative facts" or "same transaction" test to define what is one cause of action, In re Energy Cooperative Inc., 814 F.2d 1226, 1230 (7th Cir. 1987), following the approach of the Restatement (Second) of Judgments (1982) Section 24:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and what grouping constitutes a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

We hold that the first district court decision here operates as a bar to Grimes' present suit, as the claim that L&N failed to comply with the NRAB award should have been raised in the previous proceeding.^{1/}

There are two transactions underlying the present suit, both of which were also the operative facts in Grimes' first action. The first is the NRAB award itself. Grimes challenged the denial of back pay in his first action, and argued for its reversal in his opposition to appellee's summary judgment motion. Grimes could have, but did not, sufficiently raise his motion for enforcement of his seniority rights. The NRAB award clearly constituted the same operative event for both claims.

Grimes' dismissal, reinstatement and furlough constitutes a second set of facts underlying both suits. In his first suit, Grimes argued that his reinstatement and later furlough by L&N constituted a breach of the bargaining agreement, racial discrimination, and a conspiracy to deprive him of his civil rights. These claims were based on the same actions by L&N which form the basis of Grimes' present suit for confirmation of the NRAB award. "Since the two lawsuits involve this single core of operative facts, they constitute identical causes of action for res judicata purposes." Shaver, 840 F.2d at 1365. Grimes himself apparently realized his confirmation claim should have been brought with the others, as he raised it in his prayer for relief in his initial complaint to the court. He failed, however, to sufficiently present it to the court for a determination.^{2/} The fact that he raised the issue but never pursued the claim is further justification for invoking res judicata.

1/ Contrary to L&N's main argument, there is no res judicata effect from the decision of this court in Grimes' previous appeal. L&N interprets that decision as finding a waiver of any future claims that were not raised in the district court, viewing the holding as one grouped in res judicata terms. That was not the basis for this court's holding. We did hold that Grimes had waived the compliance issue, but only in respect to that particular appeal, on the basis that an appellate court cannot rule on an issue that has not been raised in the courts below. We cited Laketon Asphalt Refining, Inc. v. United States Dept. of the Interior, 624 F.2d 784, 788-89 (7th Cir. 1980), a case dealing with the proposition that an issue raised for the first time on appeal cannot be the basis for a reversal.

That is a different rule than the res judicata doctrine which acts as a permanent bar to the future raising of such a claim. We therefore must address the res judicata issue for the first time on this appeal. The only significance of that holding to the present case is that it shows Grimes' failure to raise the compliance issue in the first district court proceeding.

2/ Grimes incorrectly argues that there was a ruling in his favor in the first district court proceeding on the issue of whether his seniority rights had been impaired at his reinstatement. What the court actually stated there was "although it is not entirely clear it appears that his seniority rights may have been impaired." Grimes, 583 F. Supp. at 645. This is not a determinative ruling by the court, and was not necessary to its ultimate holding.

Finally, Grimes argues that the decision by the judge in the first case to limit the triable issue to only the retaliation claim precluded him from adequately presenting the confirmation issue. Res judicata can only be invoked where the party had a full and fair opportunity to litigate his claims in the first action. Brown v. J.I. Case Company, 813 F. 2d 848, 854 (7th Cir. 1987). Grimes has a fair opportunity to present his request for confirmation and enforcement of the award. He had the opportunity to do so during the summary judgment proceedings, just as he presented his other claims at that time. Moreover, all of the facts necessary for such an allegation--the award provision, Grimes' reinstatement to an allegedly inferior position, and his later furlough which was possibly a result of his lost seniority status--has occurred at the time of his first suit.

The district court decision denying Grimes' petition for enforcement and compliance with the NRAB award, and its \$300 sanction against Grimes pursuant to Rule 11, 3/ is therefore AFFIRMED.

3/ Grimes has not challenged the district court invocation of sanctions against him, and therefore we will not address this issue on appeal, other than to summarily affirm that sanction.

L&N requests on appeal that we issue an injunction prohibiting Grimes from filing further pleadings on any claims which could have been brought in his first district court action. L&N also made such a request below, but the district judge did not grant this injunctive relief. We need not address L&N's claim, as "the filing of a cross-appeal is rendered in whole or in part in its favor." Winstead v. Indiana Insurance Company 855 F.2d 430, 435 (7th Cir. 1988). Even if this does not amount to a jurisdictional bar, see 15 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3904 (1976) (discussing conflict on this question) we find no good reason for suspending this requirement here. At any rate, the district judge apparently believed the damages invoked under Rule 11 were a sufficient sanction against Grimes, and we hold that his failure to also grant an injunction against further related filings was not based on factual or legal errors amounting to an abuse so discretion. United States v. Kaun, 827 F.2d 1144, 1148 (7th Cir. 1987).

1

1

1

1

1

1

—

1

1

1

1

1

1

I hereby certify that on or before February 26, 1988, I served copies of the foregoing by First Class Mail upon the above counsel of record.

/S/ Kenneth C. Grimes
Kenneth C. Grimes
621 East Gum Street
Evansville, IN 47713
Telephone: 1-812-423-1600

Date: February 29, 1988

Two (2) pages

/S/ Kenneth C. Grimes

Kenneth C. Grimes, Appellant, Pro Se 621

East Gum Street

Evansville, IN 47713

Phone: 1-812-423-1600

Galen J. White, Jr.

Attorney for Appellee

Boehl, Stopher, Graves, & Deindoerfer

One River Front Place, Suite 2300-

Louisville, KY 40202

Phone: 1-502-589-5980

F. Wesley Bowers

Attorney for Appellee

Bowers, Harrison, Kent, & Miller

Permanent Savings Bldg., 4th Floor

Phone: 1-812-426-1231

CERTIFICATE OF SERVICE

Galen J. White, Jr.

Boehl, Stopher, Graves & Deindoerfer

United Kentucky Bank Building

One River Front Plaza

Louisville, KY 40202

Telephone: 1-502-589-5980

F. Wesley Bowers

Bowers, Harrison, Kent & Miller

Fourth Floor Permanent Savings Building

Evansville, IN 47708

Telephone: 1-812-426-1231

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES)	
Plaintiff)	
)	
vs.	)	CAUSE NO.
	)	EV 81-130-C
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY)	

O R D E R

This matter comes before the Court on plaintiff's Motion to Vacate. Based on the record, the Court DENIES plaintiff's Motion. Plaintiff's Motion to Vacate is DENIED.

IT IS SO ORDERED at Evansville,
Indiana this 17th day of February,
1988.

/ S/ Gene E. Brooks
Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record.

MEMORANDUM

Plaintiff's case was disposed of by Order of this Court on September 15, 1987, entered on October 16, 1987. Plaintiff filed a Motion to Vacate the Judgment, apparently pursuant to Fed. R. Civ. P. 60(b). The Court has thoroughly reviewed plaintiff's briefs in support of this Motion and is confident that plaintiff is simply re-arguing the issues upon which this case was previously disposed. Those issues were thoroughly briefed prior to the Court's order entering Judgment in favor of defendants.

By its express terms, relief from a judgment, pursuant to Fed. R. Civ. P. 60(b), is in the discretion of the Court. Plaintiff's Motion to Vacate is DENIED.

IT IS SO ORDERED at Evansville, Indiana
this ____ day of February, 1988.

/S/ Gene E. Brooks
Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES)	
Plaintiff)	
)	
vs.	)	CAUSE NO. EV
	)	81-130-C
LOUISVILLE & NASHVILLE)	
RAILROAD COMPANY)	
Defendant)	

ORDER

This matter is before the Court upon the motion to dismiss filed by defendant, Louisville & Nashville Railroad Company ("L&N"). L&N raises four grounds in support of its motion, and a general claim for injunctive relief enjoining plaintiff from filing further pleadings arising out of the claims made or which could have been made in plaintiff's original complaint. Plaintiff, Kenneth C. Grimes, ("plaintiff" or "Grimes"), has responded and the Court notes the matter ripe for ruling.

Grimes, on 11 June 1987, filed a petition for confirmation with the Court under the same docket number as his original complaint heretofore filed. Grimes is attempting to enforce an award of the National Railroad Adjustment Board ("NRAB") rendered on 13 June 1979.

The Court and L&N are experiencing *deja vu*, for plaintiff is attempting to relitigate issues that were or could have raised in the first round of litigation. This Court, in Grimes v. Louisville and Nashville R. Co., 583 F. Supp. 642 (S.D. Ind. 1984), entered an order dismissing plaintiff's action against the local union and dismissing all the claims against L&N except for a claim of retaliation.

Grimes was represented by counsel in this matter until his appeal at which time he proceeded pro se. The retaliation claim was tried before this Court and ultimately decided on 14 September 1984. The Court's ruling was adverse to plaintiff and, hence, caused him to

appeal to the United States Court of Appeals for the Seventh Circuit. Plaintiff neither appealed his involuntary dismissal or the grant of summary judgment. Rather, plaintiff merely contended that L&N failed to comply with the NRAB award. The Court of Appeals on 12 June 1985 issued an unpublished order affirming this Court. The appellate court determined that the issue on appeal was asserted for the first time, for the trial record failed to disclose any reference to this issue that was appealed.

L&N seeks to dismiss the instant petition on four grounds, one of which is res judicata. The doctrine of res judicata applies "not only to those matters actually determined in the prior case, but also to matters properly involved which could have been raised in the prior suit." Gasbarra v. Park-Ohio Industries, Inc., 655 F. 2d 119, 121 (7th Cir. 1981). Moreover, the essential elements of the doctrine are as follows:

1. A final judgment on the merits in an earlier action;
2. an identity of the cause of action in both the earlier and the later suit; and
3. an identity of parties of their privies in the two suits.

Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982). A final consideration under res judicata and the Due Process Clause is whether the plaintiff was given a full and fair opportunity to litigate his claim.

Plaintiff is attempting to confirm the NRAB award in this instant matter when he had ample opportunity earlier to pursue this claim. Plaintiff refused and is now barred from pursuing his claim. This Court's orders have been rendered final just as the Seventh Circuit unpublished order was. All the elements of res judicata having been satisfied, the Court holds that plaintiff's motion to confirm is hereby DISMISSED.

This Court shall not address the other arguments presented by L&N, for res judicata is properly invoked to warrant a dismissal.

SANCTIONS

Rule 11 of the Federal Rules of Civil Procedures governs the signing of pleadings, motions, and other papers. The Rule requires that each pleading or motion be signed by an attorney or the party if the party is proceeding pro se. The Rule further provides as follows:

"*** The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as - to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a repre-

sented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis added.)

The Rule's purpose is to "discourage dilatory or abusive tactics and [to] help streamline the litigation process by lessening frivolous claims or defenses." Hilgeford v. Peoples Bank, Inc., 113 F.R.D. 161, 164 (N.D. Ind. 1986). Although the concerns of Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) may be taken into account when dealing with pro se litigant, Rule 11 applies to anyone who signs. A pro se suit is frivolous when it has no basis, either in fact or in law. Tarkowski v. County of Lake, 775 F. 2d 173, 176 (7th Cir. 1985). The test under Rule 11 is no longer subjective, rather it is an objective test. Indianapolis Colts v. Mayor and City of Baltimore, 775 F. 2d 175, 181 (7th Cir. 1985).

The case at bar fails squarely within the purview of Rule 11, for the pleadings, motions, and other papers filed by plaintiff are not well grounded in fact and are not warranted by existing law. The foregoing analysis demonstrates that plaintiff has violated Rule 11. The Court finds that Three Hundred Dollars (\$300.00) payable to the Clerk of the Court is an appropriate sanction in this matter.

Accordingly, the defendant's motion to dismiss is GRANTED and the plaintiff's petition is hereby DISMISSED with prejudice.

This Court further cautions the plaintiff that, in the event his appeal should be deemed frivolous by the Court of Appeals, that Court may impose sanctions under Fed. R. App. 38, Farnum v. U.S., 813 F. 2d 114, 116 (7th Cir. 1987).

IT IS ORDERED at Evansville, Indiana this 15th day of September, 1987.

/S/ Gene E. Brooks

Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20443

September 18, 1986

Mr. Kenneth C. Grimes
621 East Gum Street
Evansville, IN 47713

Re: Kenneth C. Grimes v. Louisville and
Nashville Railroad Company,
No. 85-1711

Dear Mr. Grimes:

Your apparent second petition for rehearing and check in the amount of \$50.00 were received September 13, 1986, and are returned pursuant to Rule 51.4 of the Rules of the Court which prohibits the Clerk from filing consecutive petitions for rehearing.

This Court denied your petition for rehearing on August 19, 1986, and accordingly this case is considered closed by the Court.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By
/S/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

vjr
Enc.

cc: Joseph E. Stopher, Esq.
Suite 2300
One Riverfront Plaza
Louisville, KY 40202

Clerk, U.S. Court of Appeals for the
Seventh Circuit (Your No. 84-2749)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 23, 1986

Kenneth C. Grimes
621 East Gum Street
Evansville, Indiana 47713

Re: Kenneth C. Grimes V. Louisville and
Nashville Railroad Company,
A-990 (85-1711)

Dear Mr. Grimes,

Your application for a suspension of the effect of the order denying the petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who endorsed thereon the following:

"6/22/86
Deny
John Paul Stevens

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By
/S/ Edward L. Turner, Jr.

Edward L. Turner, Jr.
Assistant Clerk

ELT/elt

cc: Galen J. White, Jr.

F. Wesley Bowers

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 2, 1986

Mr. Kenneth C. Grimes
621 East Gum Street
Evansville, IN 47713

Re: Kenneth C. Grimes,
v. Louisville and Nashville Railroad
Company
No. 85-1711

Dear Mr. Grimes:

The Court today entered the following
order in the above entitled case:

The petition for a writ of certiorari
is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

/S/ Joseph F. Spaniol, Jr.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 22, 1986

Mr. Kenneth C. Grimes
621 East Gum Street
Evansville, IN 47713

RE: Kenneth C. Grimes v. Louisville and
Nashville Railroad Company
No. 85-1171

Dear Mr. Grimes:

The petition for writ of certiorari in the
above entitled case was docketed in this Court
on October 22, 1985 as No. 85-1711.

Very truly yours,

JOSPEH F. SPANIOL, JR., Clerk

By

/S/ Ruth J. Butler

Ruth J. Butler
Assistant Clerk

UNITED STATES COURT OF APPEALS
 For the Seventh Circuit
 Chicago, Illinois 60604

July 25, 1985

Before

Hon. Walter J. Cummings, Chief Judge
 Hon. John L. Coffey, Circuit Judge
 Hon. Joel M. Flaum, Circuit Judge

KENNETH C. GRIMES,	)	Appeal from the
Plaintiff-Appellant,	)	United States
	)	District Court
vs.	)	for the Southern-
	)	District of
No. 84-2749	)	Indiana
LOUISVILLE and NASHVILLE	)	Evansville
RAILROAD COMPANY,	)	Division
Defendant-Appellee.	)	No. 81 C 130
	)	Gene Brooks,
	)	Judge

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant Kenneth C. Grimes, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Submitted June 10, 1985)*

6-12-85

Before

Hon. Walter J. Cummings, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

KENNETH C. GRIMES,	) Appeal From United
<u>Plaintiff-Appellant</u>	) States District
	) Court for the
No. 84-2749 vs.	) Southern District
	) of Indiana,
LOUISVILLE & NASHVILLE	) Evansville Div.
RAILROAD COMPANY,	) No. 81 C 130
<u>Defendant-Appellee</u>	) Gene E. Brooks,
	) Judge.

O R D E R

Plaintiff Kenneth C. Grimes brought suit against his employer and union, charging in separate counts: (1) that the employer breached its collective bargaining agreement, (2) that the union breached its duty of fair representation, (3) that both the employer and union discriminated against him, in

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

violation of 42 U.S.C. 2000e et seq., and (4) that both the employer and union conspired to deprive him of his civil rights, in violation of 42 U.S.C. 1985. A fifth count concerned Grimes's appeal, pursuant to 45 U.S.C. 153 First (p), of an arbitration decision by the National Railroad Adjustment Board (the "NRAB"). The district court granted summary judgment in favor of the union on all counts, and summary judgment in favor of the employer on all counts except the third. Grimes v. Louisville and Nashville Ry. Co., 583 F. Supp 642 (S.D. Ind. 1984). The court concluded that genuine issues of material fact remained as to whether the employer violated 42 U.S.C. 2000e-3(a) when it allegedly retaliated against Grimes by placing him on furlough because he filed a charge of discrimination with the Equal Employment Opportunity Commission. Following a trial the court granted the employer an involuntary dismissal on that claim. Fed. R. Civ. P. 41(b).

On appeal, Grimes challenges neither the involuntary dismissal nor the earlier grant of summary judgment. He instead argues that the employer failed to comply with the NRAB award. While Grimes, in his prayer for relief, requested a preliminary and permanent injunction directing his employer to comply with the NRAB decision, he failed to develop this argument in the face of motions for summary judgment and involuntary dismissal. Grimes cannot blithely hold this argument in reserve for appellate review in the face of such motions. Considerations of orderly dispute resolution required him to do more than rest silently on the language in his complaint as the district court considered the disposition of charges. Cf. Laketon

Asphalt Refining, Inc. v. United States Dept. of the Interior, 624 F. 2d 784, 788-89 (7th Cir. 1980). And While Grimes maintains that enforcement of the NRAB decision is inextricably intertwined with the "retaliatory furlough" issue tried below, the trial record fails to disclose even an oblique reference to the former issue. This is not surprising since, contrary to Grimes's assertion, the issues are legally distinct. Finding the enforcement question waived, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES,)	
Plaintiff	)	FILED
	)	OCT.12, 1984
vs.)	
	)	CAUSE NO.
LOUISVILLE AND NASHVILLE	)	EV 81-130-C
RAILROAD COMPANY and)	
LOCAL 1353, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS,)	
Defendants)	

NOTICE OF APPEAL TO A COURT OF APPEALS
FROM A JUDGMENT OR ORDER OF A
DISTRICT COURT

Notice is hereby given that Kenneth C. Grimes, Plaintiff above named pursuant to 28 U.S.C. § 1291(b), hereby appeals to the United States Court of Appeals for the SEVENTH CIRCUIT (from the final judgment) entered in this action on the 14th day of September, 1984.

/S/Kenneth C. Grimes
Kenneth C. Grimes, Pro Se (Appellant)
621 East Gum Street
Evansville, Indiana 47713
1-812-423-1600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES,	)	FILED
Plaintiff	)	OCT. 18, 1984
)	
vs.	)	CAUSE NO.
	)	EV 81-130-C
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY and)	
LOCAL 1353, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS,)	
Defendants)	

AMENDED TO CORRECT TYPOGRAPHICAL ERROR
Line 2 (b)

NOTICE TO APPEAL TO A COURT OF
APPEALS FROM A JUDGMENT OR
ORDER OF A DISTRICT COURT

Notice is hereby given that Kenneth C. Grimes, Plaintiff above named pursuant to 28 U.S.C. § 1291., hereby appeals to the United States Court of Appeals for the SEVENTH CIRCUIT (from the final judgment) entered in this action of the 14th day of September, 1984.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES)
Plaintiff)

vs.)

LOUISVILLE AND NASHVILLE)
RAILROAD COMPANY and)
LOCAL 1353, INTERNATIONAL)
BROTHERHOOD OF ELECTRICAL)
WORKERS,)
Defendants)

CAUSE NO.
EV 81-130-C

9-14-84

O R D E R

This action came on for trial before the Court, Honorable Gene E. Brooks, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED and ADJUDGED
that the plaintiff take nothing,
that the action be DISMISSED on the merits

and that each party is to bear his own costs
of the action.

Judge Gene E. Brooks
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES)	
Plaintiff)	
)	
vs.	)	CAUSE NO.
	)	EV 81-130-C
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY and)	
LOCAL 1353, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS,)	
Defendants)	

MEMORANDUM ORDER

This cause came on before the Court for trial without a jury on the 26th day of July, 1984. At the close of the plaintiff's case, defendant, Louisville and Nashville Railroad Company, (hereinafter "Railroad") moved for an involuntary dismissal of plaintiff's complaint pursuant to Rule 41(b) Federal Rules of Civil Procedure on the grounds that based upon the evidence presented and the applicable law plaintiff had shown no right to relief. The Court, however, declined to render any judgment on the motion until after the close of all the

p

1

evidence. After the close of its case, the defendant Railroad renewed its 41(b) motion and the Court at that time took the matter under advisement.

The Court has now had an opportunity to review the exhibits and testimony presented as well as the applicable law in this case. And the Court now being duly advised in the premises hereby finds that the motion of the defendant, Louisville and Nashville Railroad Company, for an involuntary dismissal of plaintiff's complaint pursuant to Rule 41(b) Federal Rules of Civil Procedure should be, and hereby is, GRANTED.

Plaintiff originally commenced this action in June 1981. The complaint, as to the two named defendants, was brought in four (4) counts alleging: (1) that the defendant Railroad had breached the collective bargaining agreement, (2) that the defendant Union had breached its duty of fair representation, (3) that both defendants had

discriminated against plaintiff because of his race in violation of 42 U.S.C. 2000e et seq, and (4) that both defendants had conspired to deprive plaintiff of his civil rights in violation of 42 U.S.C. 1985. Count V of the complaint was an appeal under 45 U.S.C. 153 First (p) of a decision of the National Railroad Adjustment Board.

Both defendants thereafter filed motions for summary judgment as to all claims presented in the complaint including the appeal of the decision of the Railroad Adjustment Board. On February 18, 1984, the Court, in a lengthy order, granted the defendant Union's motion for summary judgment as to all claims against the Union. The Court also granted, in part, the defendant Railroad's motion for summary judgment as to all claims including the appeal of the Railroad Adjustment Board's decision, finding that the Railroad had failed to show that there were no genuine issues of material fact as to Grimes's claim of retaliation, thereby

precluding the grant of summary judgment as to that issue alone.

Thereafter, on July 26, 1984, this cause came on for trial on the sole issue of whether the defendant Railroad had retaliated against Grimes because of his filing of a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") when they placed him on furlough on March 30, 1984.

At the trial of this issue Grimes, who had previously been represented by counsel, elected to proceed pro se. Despite having previously filed a list of some thirty (30) potential witnesses who might be called upon to testify, plaintiff failed to present any witnesses at trial. Grimes did, however, introduce approximately thirty (30) exhibits which he contended supported his claim of retaliation. Defendant, Railroad, called one witness, Billy Ray Montgomery, to testify in its behalf, and introduced four (4) exhibits.

Title 42 United States Code Section 2000e-3(a), the provision of Title VII of the

discriminated against plaintiff because of his race in violation of 42 U.S.C. 2000e et seq, and (4) that both defendants had conspired to deprive plaintiff of his civil rights in violation of 42 U.S.C. 1985. Count V of the complaint was an appeal under 45 U.S.C. 153 First (p) of a decision of the National Railroad Adjustment Board.

Both defendants thereafter filed motions for summary judgment as to all claims presented in the complaint including the appeal of the decision of the Railroad Adjustment Board. On February 18, 1984, the Court, in a lengthy order, granted the defendant Union's motion for summary judgment as to all claims against the Union. The Court also granted, in part, the defendant Railroad's motion for summary judgment as to all claims including the appeal of the Railroad Adjustment Board's decision, finding that the Railroad had failed to show that there were no genuine issues of material fact as to Grimes's claim of retaliation, thereby

precluding the grant of summary judgment as to that issue alone.

Thereafter, on July 26, 1984, this cause came on for trial on the sole issue of whether the defendant Railroad had retaliated against Grimes because of his filing of a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") when they placed him on furlough on March 30, 1984.

At the trial of this issue Grimes, who had previously been represented by counsel, elected to proceed pro se. Despite having previously filed a list of some thirty (30) potential witnesses who might be called upon to testify, plaintiff failed to present any witnesses at trial. Grimes did, however, introduce approximately thirty (30) exhibits which he contended supported his claim of retaliation. Defendant, Railroad, called one witness, Billy Ray Montgomery, to testify in its behalf, and introduced four (4) exhibits.

Title 42 United States Code Section 2000e-3(a), the provision of Title VII of the

Civil Rights Act which governs retaliation, provides in pertinent part that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge . . . under this title (42 USC 2000e-17).

It is clear that in order for a plaintiff to establish a violation of the above section he must prove (1) that there was some statutory protected participation under Title VII known by the alleged retaliator; (2) that an adverse employment action occurred, and (3) that there was some causal connection between the participation and the adverse employment action. Grant v. Bethlehem Steel Corp., 622 F2d 43 (2nd Cir. 1980); Equal Employment Opportunity Commission v. Locals 14 and 15, International Union of Operating Engineers, 438 F.Supp 876 (S.D.N.Y. 1977). Failure of plaintiff to carry his burden of proof as to any of the above elements will defeat his claim. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Burris v. United

Telephone Co. of Kansas, Inc., 683 F.2d 339
(10th Cir. 1982).

From the exhibits and testimony presented at trial the following may be found. Grimes was employed by L & N Railroad in 1981 as an apprentice electrician assigned to the mechanical department of the Evansville Division. At that time, he was the only apprentice electrician in that department. The supervisor of the department during that period and continuing until late 1983, was Billy Ray Montgomery. During March of 1981, Montgomery had a series of discussions with his supervisors concerning proposed personnel reductions in his department due to the threatened nationwide coal strike. On or about March 20th, Montgomery was advised to carry out the necessary personnel reductions, and on March 23, Montgomery caused to be sent out a notice furloughing Grimes effective March 30, 1981. According to the testimony of Montgomery, business both during and after the coal

strike continued to decline, and it became necessary to furlough other employees as well. To date, some of these employees have been recalled, while others, including Grimes, have not. It is undisputed that in the event business increases necessitated it, these employees, and Grimes would be recalled according to their seniority. It may be inferred that Grimes, having not obtained the requisite number of hours for journeyman status, will not be recalled until after all journeyman electricians are recalled.

At trial, it was uncontested that Grimes filed a charge of discrimination with the Evansville Human Relations Commission and the Equal Employment Opportunity Commission on March 16, 1981, seven (7) days prior to his receipt of notice from Montgomery that he was being placed on furlough effective March 30, 1981. However, plaintiff's own exhibits reflect that the Railroad did not receive notice of Grimes's charge until March 26, 1981, three (3) days after Grimes had

received notice of his furlough. Furthermore, Montgomery testified that at the time Grimes was furloughed he had no knowledge of the fact that Grimes had filed a charge of discrimination with the Equal Employment Opportunity Commission, and plaintiff presented no evidence which contradicts this testimony.

From the evidence presented, it is clear that Grimes's claim of retaliation must fail for a number of reasons. The first element which Grimes is required to establish is that he participated in some activity under Title VII and that the Railroad had knowledge of that participation. There is no doubt that filing of an EEOC charge is a protected activity under Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a). Equal Employment Opportunity Commission v. Locals 14 and 15, supra; Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). However, Grimes presented no evidence that at the time of the filing of the EEOC charge or

at the time the decision was made to place him on furlough that the Railroad had any knowledge that Grimes had filed a charge of discrimination, thereby negating the retaliatory motive which is a part of the first element.

While it is true, that the Railroad did become aware of Grimes's EEOC charge on March 26th, no evidence was presented that Montgomery, who was responsible for determining who to furlough, became aware of the charge before March 30th, the date on which the furlough became effective. What Grimes asks the Court to infer from the timing alone is that he was discharged in retaliation for filing charges. However, that is something the Court is unable to do. See, Downey v. A.II. Belo Corporation, 402 F. Supp 1368 (N.D. Tex. 1975).

Assuming that Grimes's furlough is an employment action disadvantaging a person who has engaged in a protected activity, thereby satisfying the second element of

Section 704(a), Grimes has still failed to establish a causal connection between the first and second elements, that is, a retaliatory motive playing a part in the adverse employment action. Here, the Railroad furloughed employees in the various crafts as the need arose, Grimes as the only apprentice electrician was furloughed first, and it is undisputed that that decision was made prior to Grimes's filing of a discrimination charge. Plaintiff is unable to point to any facts which would indicate a causal connection between the EEOC charge and his furlough, and in light of the Court's earlier finding of no retaliatory motive, the Court is of the opinion that Grimes has failed to carry his burden of proof as to the third element of Section 704(a).

It is clear from the vigor with which Grimes has pursued this case that he feels that the Railroad has treated him unfairly. It is equally clear, however, that in order to prevail upon his claim of

retaliation that something more need be presented than mere allegations of retaliation based upon inferences to be drawn from timing alone. The Court has carefully reviewed the exhibits introduced by plaintiff, most of which have no bearing upon plaintiff's retaliation claim, and can find nothing which lends support to Grimes's argument that the Railroad retaliated against him for his filing of an EEOC charge.

Accordingly, the Court finds that defendant, Louisville and Nashville Railroad Company's motion for an involuntary dismissal pursuant to Rule 41(b) Federal Rules the Civil Procedure should be GRANTED.

IT IS SO ORDERED

DATED this 14th day of September,
1984.

Judge Gene E. Books
United States District Court
Southern Districts of Indiana

NOTE: THE CLERK OF THE UNITED STATES

DISTRICT COURT, SOUTHERN DISTRICT
OF INDIANA, EVANSVILLE DIVISION,
SHALL MAKE DISTRIBUTION TO ALL
COUNSEL OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

APRIL 24, 1984

Before

HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

KENNETH C. GRIMES,)	
Plaintiff-Appellant)	)	Appeal from the
	)	United States
	)	District Court for
	)	the Southern
	)	District of Indiana,
	)	Evansville Division
)	
No. 84-1392 vs.	)	No. 81 c 130
	)	Judge Gene E. Brooks
LOUISVILLE AND)	
NASHVILLE RAILROAD)	
COMPANY and LOCAL 1353))	
INTERNATIONAL BROTHER-)	
HOOD OF ELECTRICAL)	
WORKERS,)	
Defendants-Appellees))	

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS APPEAL" filed herein on April 9, 1984, by counsel for the appellees, with brief in support thereof.

2. "RESPONSE TO 'MOTION TO DISMISS APPEAL' FILED APRIL 9, 1984 BY COUNSEL FOR THE DEFENDANT-APPELLEE" filed herein on April 18, 1984, by counsel for the plaintiff-appellant.

3. "MOTION FOR APPEAL CERTIFICATION" filed herein on April 9, 1984, by pro se appellant.

An order entered by the district court disposing of fewer than all of the issues or parties before it is a grant of partial summary judgment, which is not a final order for purposes of appeal. Accordingly

IT IS ORDERED that appellees' motion is hereby GRANTED and this appeal is hereby DISMISSED.

IT IS FURTHER ORDERED that appellant's "MOTION FOR APPEAL CERTIFICATION" is denied on the ground that Federal Rule of Civil Procedure 54(b) certification must be sought in the district court. See Federal Rule of Appellate Procedure 5(a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES)	
Plaintiff	)	FILED
	)	MARCH 9, 1984
vs.)	
)	
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY, AND	)	CAUSE NO.
LOCAL 1353, INTERNATIONAL	)	EV 81-130-C
BROTHERHOOD OF ELECTRICAL)	
WORKERS (Defendants))	

NOTICE OF APPEAL

Notice is hereby given that Kenneth C. Grimes Plaintiff herein, appeal to the United States Court of Appeals to the Seventh Circuit Court of Appeals to the Seventh Circuit Court from Summary Judgment entered in this action on the 10th day of February 1984, in the United States District Court Southern District of Indiana, Evansville Division.

/S/ Kenneth C. Grimes
621 East
Gum Street
Evansville, Indiana 47713

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES,
Plaintiff

VS.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY and LOCAL
1353, International
Brotherhood Electrical
Workers,
Defendants

)
) CAUSE NO.
) EV 81-130-C
)

) 2-10-84
)
)
)
)
)
)

O R D E R

This matter comes before the Court upon the motions of the defendants Louisville and Nashville Railroad Company and Local 1353, International Brotherhood of Electrical Workers for Summary Judgment pursuant to Rule 56, Federal Rules Civil Procedure,. For the reasons stated below the motions are GRANTED in part and DENIED in part.

MEMORANDUM

Kenneth C. Grimes (Grimes) is a black male who was employed by Louisville and Nashville Railroad Company (Railroad) in February 1976 as an "electrician apprentice." He was a member of Local 1353 International Brotherhood of Electrical Workers (Union) and his terms of employment were covered by a collective bargaining agreement between the Railroad and the Union. One of the provisions of the collective bargaining agreement is that "an employee (who) has been unjustly suspended or dismissed. . . shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss . . . resulting from said suspension or dismissal." See, Rule 34 of Agreement.

In late August or early September of 1976 Grimes was involved in an altercation with a temporary supervisor concerning the installation of an electrical switch. A disciplinary hearing ensued in September 1976 at which a

The defendant, Local 1353 International Brotherhood Electrical Workers' motion for summary judgment is GRANTED as to pleading Paragraphs Two, Three, and Four. The defendant L&N Railroad Company/s motion for summary judgment is GRANTED in full as to pleading Paragraphs One, Four, and Five, and GRANTED in part and DENIED in part as to pleading Paragraph Three.

IT IS SO ORDERED.

Dated at Evansville, Indiana this 10th day of February, 1984.

/S/ Gene E. Brooks
Judge Gene E. Brooks
United States District Court
Southern District of Indiana

Union representative was present to represent Grimes but participated minimally. Subsequent to the hearing Grimes was suspended from his employment; and then discharged. At the time of his dismissal, his position was that of an "upgraded electrician apprentice." After the discharge the Union processed Grimes' grievance through a hearing before the National Railroad Adjustment Board (Board).

On June 13, 1979 the Board rendered its decision and ordered the Railroad to reinstate Grimes without loss of seniority or position but without back pay. The decision explained that, while Grimes had improperly refused to obey an order from a supervisor, mitigating circumstances made dismissal an excessive form of discipline. Grimes returned to work on July 9, 1979 as an "electrician apprentice" rather than an "upgraded electrician apprentice" and although it is not entirely clear it appears that his seniority rights may have

been impaired. After his return to work Grimes complained to Union representatives about his loss of position and seniority, but it appears that no action was taken.

On March 16, 1981 Grimes filed a charge of racial discrimination against the Railroad with the Equal Employment Opportunity Commission (EEOC). On March 30, 1981 Grimes was laid off and placed on furlough, a status which still existed at the time of the filing of this action. Thereafter, on June 11, 1981 Grimes filed suit against the Railroad and the Union invoking jurisdiction of this Court pursuant to 28 U.S.C. § § 1331 and 1343.

The Complaint states five (5) claims designated as pleading paragraphs, which are as follows:

- (1) A claim against the Railroad for breach of the collective bargaining agreement arising out of Grimes' discharge, reinstatement, and subsequent furlough.

- (2) A claim against the Union for breach of its duty of fair representation under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.
- (3) A claim against both the Railroad and the Union for racial discrimination in employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.
- (4) A claim against both the Railroad and the Union for conspiring to deprive Grimes of his civil rights in violation of 42 U.S.C. § 1985.
- (5) An appeal under 45 U.S.C. § 153 First (p), (g), 153, Second, of the Board decision which refused to order back pay for the period of time during which Grimes had been unemployed.

In March and April of 1982 each of the defendants filed a motion for summary judgment as to all claims made against them and as to the appeal of the Board's decision. Since defendants' motions encompass all of Grimes' claims the Court will address each claim separately and in order with the exception of the claims which are set forth in pleading para-

graphs one and two which, because of their nature, are interdependent and are thus best addressed together.

BREACH OF COLLECTIVE BARGAINING AGREEMENT
AND BREACH OF THE DUTY OF FAIR
REPRESENTATION CLAIMS

Grimes claims that, by discharging him without just cause and then reinstating him in a lower rated position with loss of seniority and back pay, the Railroad breached the collective bargaining agreement with the Union and that the Union breached its duty of fair representation by failing to adequately and timely represent him in his disputes with the Railroad. Defendants argue that Grimes' claims should be dismissed since such claims are, based upon the undisputed facts, without merit and are barred by the applicable statute of limitations. The Union relies on the two (2) year statute of limitations for actions related to employment provided for in Indiana Code

§34-1-2-1-5, while the Railroad contends that the appropriate limitations period is the ninety (90) day period provided for in Indiana Code § 34-4-2-13 which governs actions to vacate arbitration awards. Plaintiff in his response to the motions relies alternatively on the two (2) year statute of limitations set forth in the Federal Railway Labor Act, 42 U.S.C. § 153(R), or if the state statute of limitation is to be applied then upon Indiana Code §34-1-2-1.5.

The United States Supreme Court recently addressed the question of what statute of limitations should apply in an employee's suit against an employer and a union alleging the employer's breach of the collective bargaining agreement and the union's breach of its duty of fair representation. Del Costello v. International Brotherhood of Teamsters, U.S. 51 USLW 4693 (1983). In that case, the Court found that they should adopt the six (6) month sta-

tute of limitations embodied in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) for suits against both the employer and the union. This view has been followed in recent Seventh Circuit decisions. See e.g. Metz v. Tootsie Roll Industries, No 82-2945 (7th Cir. Aug. 16, 1983); Storck V. International Brotherhood of Teamsters, Nos. 82-1925, 82-1926 (7th Cir. July 25, 1983). Thus, based upon the above authorities any claim which Grimes has that arose from activity prior to December 11, 1980 would be time-barred since this suit was commenced on June 11, 1981.

However, while a suit brought by an employee against an employer for breach of the collective bargaining agreement and against a union for breach of the duty of fair representation is generally brought pursuant to §301 of the Labor Management Relations Act, the Seventh Circuit has recently found that Section 301 does not apply to employers sub-

ject to the Railway Labor Act, and that no other statute purports to give federal courts jurisdiction to enforce collective bargaining agreements with such employers. Graf v. Elgin, Joilet and Eastern Railway Company and Brotherhood of Railway Carmen, Local No. 882, No. 82-186A. Slip Op. at 3 (7th Cir. Jan 7, 1983). The Court, in Graf did find, however, that a contract claim against an employer could be brought under a federal common law of railroad collective bargaining contract interpretation since it made sense to do so in as much as the common law was already being applied in workers' suits against unions. Id. at 7,8.

The question that the Seventh Circuit did not face in Graf (since the only issues presented dealt with the jurisdiction of the federal courts) and the one that still remains to be answered is. - (What is the applicable statute of limitations for an employee's suit

against an employer and a union which alleges the employer's breach of the collective bargaining agreement and the Union's breach of the duty of fair representation, where the employer is not subject to §301 of the Labor Management Relations Act?)

As already noted, the Supreme Court in Del Costello held that the six (6) month statute of limitations of §10(b) should be applied in §301/fair representation cases. (The Court therein noted that while there is no federal statute of limitations expressly applicable to this type of suit, that §301/fair representation claims are akin to charges of unfair labor practices which are subject to the statutory limitation period of §10(b).) Thus, the Court concluded that "(t)he need for uniformity among procedures followed for similar claims. . . as well as the clear congressional indication of the proper balance between the interests at stake, counsels the

adoptoin of 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." Id. at 4698.

This Court finds the reasoning in Del Costello to be persuasive. (The Court also notes that Del Costello was decided after the Seventh Circuit's decision in Graf, and that the Supreme Court did not expressly limit its decision to breach of contract/ fair representation claims brought pursuant to §301.) Thus, although Grimes' claims against the Railroad and the Union can't be brought as a §301/fair representation action, the Court is of the opinion that they are sufficiently similar to that type of action such that the six (6) month statute of limitations enunciated in Del Costello should be applied.

As noted earlier, Grimes' discharge occurred in 1976. His reinstatement came in July 1979. Both events are alleged to have been breaches of the collective bargaining agree-

ment and the Union's duty of fair representation. From these facts, defendants argue that it is unquestionable that plaintiff's complaint as to these two events is time barred. The Court is of the opinion that defendants are correct in as much as both events occurred substantially before the limitations period that the Court has found applicable to this case. Although it is not abundantly clear from the response, Grimes, however, seems to contend that his discharge, subsequent reinstatement, and furlough constitutes a continuing series of wrongs which toll the running of any statute of limitations. Under this view since Grimes is currently furloughed the alleged breaches continue to occur and damages continue to accrue.

The court does not agree that the "continuing violation" doctrine proposed by Grimes has application in this case. The only activity which occurred within the limitations period

is Grimes' furlough in March 1981. Clearly,
the simple act of being laid off due to a lack
of seniority is not of itself unlawful or a
breach of the collective bargaining agreement.
(Apparently Grimes does not dispute this fact
since there is no indication that he ever
filed a grievance with regard to the furlough
itself, or that an effort to comply with the
grievance mechanism would have been futile.)
Therefore, the only way in which the March
1981 furlough can be charged to be a breach of
the contract is through reliance on what are
alleged to be earlier breaches. However, to
allow Grimes to cloak with illegality his fur-
lough by reliance upon earlier events which
are now time barred would result in the revi-
val of what are now legally defunct claims.
Local Lodge No. 1424, International Associa-
tion of Machinists v. N.L.R.B., 362 U.S. 411
(1960); Metz v. Tootsie Roll Industries,
supra.

Based upon the foregoing, the Court is of the opinion that Grimes' discharge and reinstatement claims against both defendants are barred by the limitations period set out in Del Costello. Additionally, since the alleged wrongful conduct of the defendants with regard to Grimes furlough is predicated upon the earlier events, that activity cannot constitute a "continuing violation." Nor can Grimes claim that the furlough itself is a breach of the contract, since before an employee may litigate the merits of his contract claim he must prevail on the unfair representation claim against the Union, United Parcel Service, Inc. v. Mitchell, 415 U.S. 56, 101 S. Ct. 1559 (1981), a claim which cannot be brought in this case since no grievance has ever been filed with respect to the furlough.

Therefore, defendants' motion for summary judgment as to pleading paragraphs one and two of plaintiff's complaint are hereby GRANTED.

TITLE VII - DISCRIMINATION CLAIM

Grimes contends in pleading paragraphs three (3) that the defendants intentionally engaged in discriminatory employment practices on the basis of race that deprived him of the right to the same employment opportunities enjoyed by white persons. The defendant Railroad contends that in so far as Grimes' charge of discrimination is predicated upon his discharge and reinstatement that the claim is untimely because both events occurred substantially more than One hundred Eighty (180) days prior to the complaint Grimes filed with EEOC.

As to Grimes' charge that he was furloughed in retaliation for his complaint to the EEOC the Railroad argues that since no charge of retaliation has been filed with the EEOC Grimes may not assert for the first time that claim in this action. The Union's basis for summary judgment as to pleading paragraph three(3) is less complicated. It is the

Union's contention that since it has never been the subject of an EEOC charge that the Court lacks jurisdiction over it as to this claim.

It should be noted that Congress has provided explicit jurisdictional requirements in Title VII cases before a plaintiff may maintain a suit - See, 42 U.S.C. §2000e-5. First, a plaintiff must, absent exceptional circumstances, file a timely charge of discrimination with the EEOC. Second, the plaintiff must receive a right to sue letter from the EEOC and acted upon it. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011 (1974); McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Failure to satisfy both requirements deprives the Court of jurisdiction over the Title VII claims Movement For Opportunity, Etc. v. General Motors, 622 F. 2d 1235 (7th Cir. 1980); Gibson v. Kroeger Co., 506 F. 2d 647 (7th Cir. 1974).

In the case sub judice Grimes has failed to allege in his complaint compliance with the above requirements. Nor does Grimes in his response to defendant's motions indicate that he received a right to sue letter from the EEOC. On that basis it would appear that the Court is without jurisdiction to entertain Grimes' Title VII claims. However, from a reading of the motions as well as all the other documents filed in this cause, there is little doubt that Grimes did in fact file a complaint with the EEOC on March 16, 1981, and it appears that the EEOC issued a right to sue letter on June 3, 1981. See, Plaintiff's List of Witnesses and Exhibits, Item 5(c). Thus, the Court is satisfied that Grimes has complied with the second requirement for filing suit.

However, it is the first requirement (that of filing a timely charge before the EEOC) that the defendant Railroad contends Grimes has not complied with the second requirement for filing suit.

However, it is the first requirement (that of filing a timely charge before the EEOC) that the defendant Railroad contends Grimes has not complied with. Section 2000e-5 requires that a complaint be filed with the EEOC within One Hundred and Eighty (180) days after the alleged unlawful employment practice occurred. It is undisputed in this case that no such charge was filed within One Hundred Eighty (180) days of either Grimes' discharge in 1976 or his reinstatement in 1979. Thus, any claim based solely on these two events is barred. Grimes contends however that there is a continuing violation in that the Railroad

failed to accord him the proper seniority status, thus giving present effect to the Railroad's past conduct.

There is no doubt in the Court's mind that the Railroad's seniority system gives present effect to what is alleged to have been a past act of discrimination (i.e. Grime's reinstatement in 1979 without seniority credit). Moreover, it is clear that seniority can, and oftentimes does, govern which employees will be furloughed or laid off and which will be recalled. But in the case before the Court Grimes does not attack the bona fides of the Railroad's seniority system. He merely argues that the past wrongful conduct has a continuing effect.

It is clear that past acts of discrimination which have not been made the basis for a timely charge before the EEOC are the legal equivalent of discriminatory acts which occurred before the statute was passed. United

Air Lines v. Evans, 431 S.Ct. 553 (1977). Therefore, the Railroad is entitled to treat their actions in 1976, and 1979 as lawful since Grimes' EEOC complaint was not filed until 1981. And past events, which have no legal significance can not now support an argument that the violation is a continuing one. United Air Lines, supra.

Grimes further contends, however, that he was furloughed in retaliation for his March 16, 1981 EEOC charge. The Railroad argues that since no charge of retaliation has ever been filed with the EEOC Grimes may not now for the first time assert such claim. With this the Court cannot agree. While it is true that a Court may not generally exercise jurisdiction over claims not encompassed within the EEOC charge, Plummer v. Chicago Journeymen Plumbers, Local Union Etc., 452 F.Supp. 1127 (D.C. Ill. 1978), the Court may exercise jurisdiction over like or related matters

which might reasonably be expected to be subject to EEOC investigation growing out of the charge. Flescr v. Eastern Pennsylvania Psychiatric Institute, 434 F.Supp. 963 (E.D. Pa. 1977). On the basis of the record before the Court, it is impossible to say that Grimes' charge of retaliation is not related to the charges that were pending before the EEOC at the time that Grimes was furloughed. Furthermore, retaliation for participating in the EEOC process can exist even if the claims contained in the EEOC charge are without merit or are based upon activity which is found to be lawful. Abramson v. Univeristy of Hawaii, 594 F.2d 202 (9th Cir. 1979). It is the nature of retaliation claims that they arise only after the filing of an EEOC charge. To require a plaintiff to resort to the EEOC process before bringing such a charge would mean that in every case where retaliation is an issue the plaintiff would have to file a sec-

ond EEOC charge. The Court is of the opinion that such requirement would have the effect of erecting an unnecessary procedural barrier to the maintenance of a Title VII suit which could discourage employees from exercising their rights under the Civil Rights Act. See, National Organization for Women v. Sperry Rand Corp., 457 F.Supp. 1338 (D.C. Conn. 1978); Berstein v. National Liberty International, 407 F.Supp. 709 (D.C. Pa. 1976); Held v. Missouri Pacific Railroad Company, 373 F.Supp. 996 (D.C. Tex. 1974).

Based upon the foregoing, the Court finds that the defendant Railroad's motion for summary judgment as to pleading paragraph three of plaintiff's complaint should be GRANTED in part and DENIED in part. In so far as Grimes' claims relate to his 1976 discharge, his 1979 reinstatement, and his contention of a continuing violation, such claims are barred due to untimely filing with the EEOC. The Court

therefore lacks jurisdiction over such claims and the defendant Railroad's motion, with respect to those claims is GRANTED. With regard to Grimes' claim of retaliation, the Court finds that the averments in defendant's motion are insufficient to show that there are no genuine issues of material fact as to the reason for Grimes' furlough thereby precluding the granting of defendant Railroad's motion. Thus, as to that issue the Railroad's motion for summary judgment is DENIED.

As noted earlier, the defendant Union also filed a motion for summary judgment as to pleading paragraph three. At a pre-trial conference held on April 5, 1982 before the Honorable Patrick Endsley, United States Magistrate, the plaintiff, and plaintiff's counsel agreed that pleading paragraph three of the complaint was without merit as to any claim against the Union. The Magistrate at that time found that the Union's motion for

summary judgment as to that claim should be granted. The Court having examined the record in this cause, concurs with the finding of the Magistrate, and hereby GRANTS the defendant Union's motion for summary judgment as to pleading paragraph three.

§ 1985 CONSPIRACY CLAIM

Pleading paragraph four (4) of Grimes' complaint alleges that the defendants conspired to deprive Grimes of his right to equal employment opportunities in violation of Title 42 United States Code Section 1985. Both defendants have moved for summary judgment as to this claim on two separate grounds: (1) that the applicable statutes of limitations for this type of action is a bar to recovery for any events occurring prior to June 11, 1979, and (2) that the conspiracy claim is a wholly speculative claim which lacks any factual basis. Grimes attempts to resist defendants' second contention by stating that the

alleged discriminatory practices of the defendant Railroad, occurring as they did in a union ship, could not have occurred without the tacit and actual consent of the Union, thus giving rise to more than a mere suspicion that a conspiracy existed.

The Seventh Circuit has had occasion to address the question of what is the appropriate statute of limitations for actions brought pursuant to the Civil Rights Enforcement Statutes, Secs. 1981, 1983, 1985, and 1986. See, Movement For Opportunity Etc., supra (§ 1981 Action); Hill v. Trustees of Indiana University, 537 F.2d 248 (7th Cir. 1976), (§ 1983 Action). In both cases, the appellate court found that the two year statute of limitations in Indiana Code § 34-1-2-2 should be applied to the civil rights actions then under consideration. Grimes has cited the Court to no authority, and indeed failed to even address the issue in his brief, which

would justify applying a different statute of limitations to the present § 1985(3) action. The Court is therefore of the opinion that in light of the decisions in Movement For Opportunity, Etc. and Hill that the appropriate statute of limitations to be applied to Grimes' conspiracy claim is two (2) years.¹ Thus, any claim that Grimes could assert that arose before June 11, 1979 is time barred. Application of this period of limitations, then leaves Grimes only with the claim of conspiracy as to his reinstatement in July 1979, and his furlough in March 1981.

1/ (1) Indiana has enacted Indiana Code § 34-1-2-1.5 which provides specifically for a two (2) year statute of limitations for all employment related actions.

Examination of Grimes' complaint with respect to his conspiracy claim reveals that the only allegation supporting his claim that, "[t]he practices and policies of Defendants "Union" and "Company" constitute a conspiracy" See, Complaint 39. In essence Grimes seems to be saying that the alleged wrongful acts could not have occurred but for the existence of a conspiracy. However, when Grimes was asked in his deposition to delineate what evidence he possessed which supported the existence of the conspiracy he answered that:

[T]he Union and the Company were both involved in either seeing that I did or did not have what I am supposed to have. And beyond that, its very difficult for me to give you an accurate statement about what particular specifics, because I don't know.

Grimes Deposition 36-37.

While the Court agrees with the Seventh Circuit's statement in Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975) cert. denied 425 U.S. 943, 96 S.Ct. 1683 (1976) that:

[P]laintiff is entitled to the fullest opportunity to adduce evidence in support of (his) claim. But (he) is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim . . .

it must appear from the complaint that there is at least sufficient minimal factual support of the existence of a conspiracy. It is,

[n]ot sufficient to allege that defendants merely acted in concert or with a common goal. There must be allegations that the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding. Even were such allegations made, they must further be supported by some factual allegation suggesting such meeting of the minds. (Emphasis added)

Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (alleged conspiracy under § 1983).

Perusal of the complaint does not reveal any allegation or factual basis to support a finding of mutual understanding or of a meeting of the minds between the Union and the Railroad. Nor can Grimes point to anything which would support such a finding. He simply requests that this Court infer from his discharge, reinstatement, and furlough that there was some sort of agreement to discriminate against him. This the Court is unwilling to do. Moreover, Grimes asserts his claims as violation of Title VII, see, Complaint 1, 36.

However, it is clear that 1985(3) may not be invoked to redress violations of Title VII. Great American Federal Savings and Loan Association, 442 U.S. 366 (1979).

Therefore, for the reasons given above the Court is of the opinion that pleading paragraph four (4) of the complaint fails to sufficiently allege the existence of a 1985(3) violation. And in as much as the alleged

violations are based upon violation of Title VII, 1985(3) action is not the appropriate remedial action. The defendant Railroad's motion for summary judgment as to pleading paragraph four (4) is hereby GRANTED. Likewise, defendant Union's motion for summary judgment as to the same claim is also GRANTED.

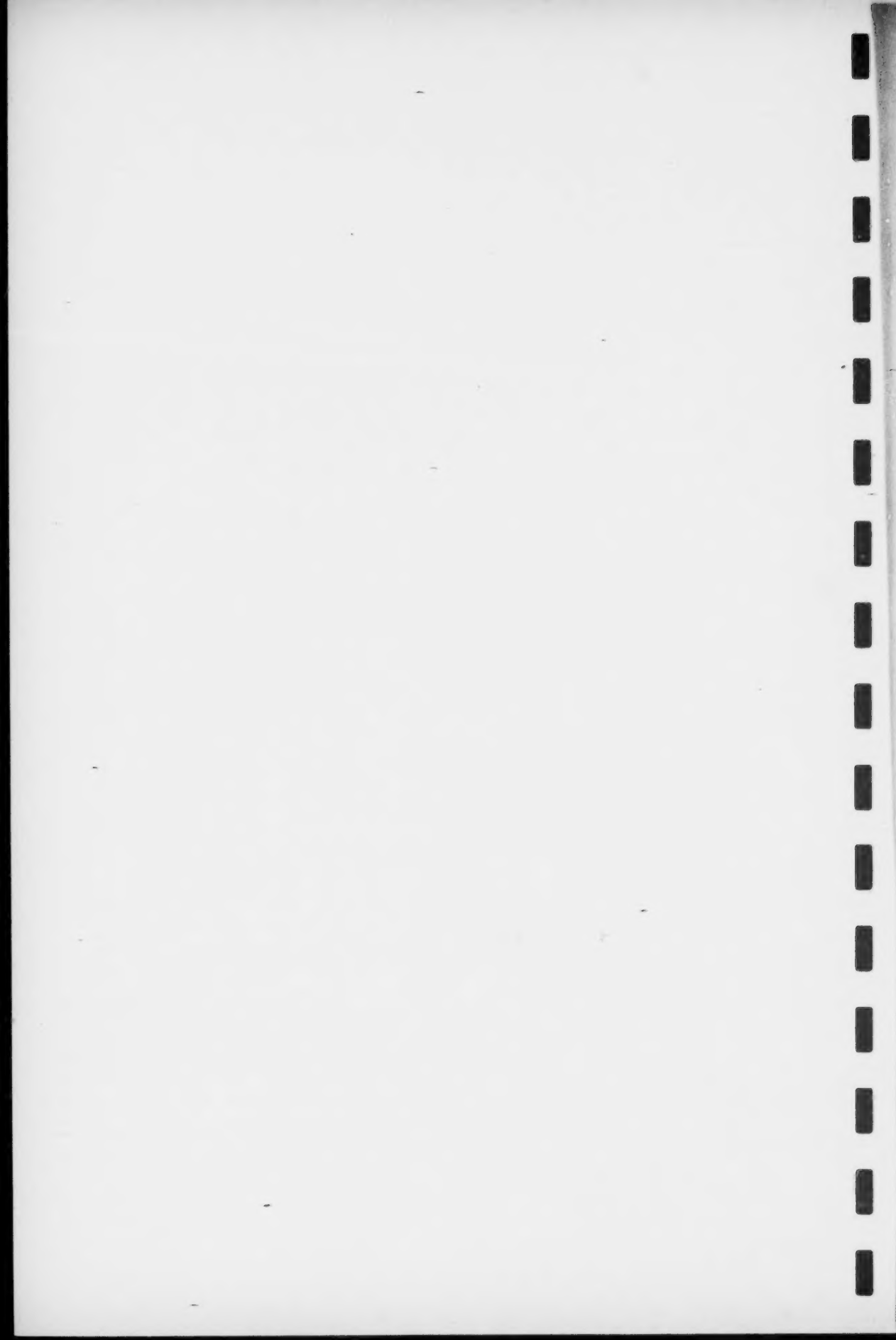
APPEAL OF DECISION OF THE NATIONAL
RAILROAD ADJUSTMENT BOARD

Pleading paragraphs five (5) of the complaint is an appeal of the June 13, 1979 decision of the National Railroad Adjustment Board (No. 7956 Second Division in so far as the decision denied Grimes compensation for lost wages, benefits, and increments from September 22, 1976 through July 7, 1978. Grimes contends that the decision was contrary to the evidence and the Board's own findings,

discriminatory, arbitrary, capricious, and in complete disregard of the provisions of the collective bargaining agreement.

The defendant Railroad has moved for summary judgment as a matter of law as to this claim on the basis that the scope of review of this Court is limited by the Railway Labor Act and that Grimes has not demonstrated that the decision should be set aside.

The National Railroad Adjustment Board is essentially an arbitration panel established and governed by 45 U.S.C. 151 et seq. Courts reviewing decisions of the Board have an extremely narrow standard of review. Union Pacific Railroad Co. V. Sheehan, 439 U.S. 89 (1978); Kotakis V. Elgin, Joliet, and Eastern Railway Co., 520 F. 2d 570 (7th Cir. 1975). The decision of the Board may be set aside only for failure of the Board to comply with the requirements of the chapter; for failure of the order to conform or confine itself to



matters within the scope of the divisions jurisdiction; or for fraud or corruption by a member of the division making the order. See, 45 U.S.C. 153 First (q).

Pleading paragraph five (5) of the complaint does not allege that the Second (Division failed to comply) with the requirements of the Railway Labor Act, or that there was any fraud or corruption by any member of the Board. Instead, Grimes essentially alleges that the Board's decision did not confine itself to or conform with matters within the scope of the Board's jurisdiction since the decision failed to award him back pay. In order for the Court to find that the Board's decision is outside the scope of the division's jurisdiction, the decision must be "without foundation in reason or fact" Laday v. Chicago Milwaukee, St. Paul and Pacific Railroad Co., 422 F. 2d 1168 (7th Cir. 1970), or "wholly baseless and without reason." Gun-

discharge, September 21, 1976, and continuing thereafter until such time as he is restored to service.

3. That the Louisville and Nashville Railroad Company be further ordered to make Upgraded Electrician Apprentice K. C. Grimes whole with respect to all rights, privileges and benefits associated with his railroad employment, such as, but not limited to vacation, health and welfare and insurance benefits.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was dismissed for insubordination, Carrier charging that on August 15, 1976, he failed to apply an electric switch on Cab 6428 and that he refused to comply with the instructions of his Foreman to surrender the switch after having refused to apply it to caboose 6428. Claimant entered Carrier's service on February 26, 1976, as an electrician's apprentice. At the time of the incident,

ther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257 86 S.Ct. 368 (1965). And it is clear that the Court on review may not open up the Board's findings on the merits, or interpret the collective bargaining agreement. Gunther, supra, Edwards v., St. Louis-San Francisco Railway Co., 361 F.2d 946 (7th Cir. 1966).

In the case sub judice Grimes contends that the failure of the Board to award backpay is "baseless" and "without reason". However, there is authority for the proposition that an award or reinstatement without back pay is not so baseless or wholly without reason as to require reversal of the arbitrator's decision.

See, Air Lines Pilots Ass'n Intern., V. Eastern Airlines, 632 F. 2d 1321 (5th Cir. 1980); Amoco Oil Co. V. Oil, Chem. & Atomic Wkrs. Etc., 548 F. 2d 1288 (7th Cir. 1977) cert. denied 97 S.Ct. 1697 (1977); Rinker V. Penn

Central Transportation Co., 350 F. Supp. 217 (E.D. Pa. 1972). As the Court noted in Rinker:

. . . (T)here is nothing at all inconsistent about an award of reinstatement without back pay . . . the Board's consideration was not confined solely to whether disciplinary action by the railroad was warranted, it extended also to determining the propriety of the disciplinary action imposed. Quite obviously the Board here concluded that disciplinary action was warranted, but that complete dismissal was not. The refusal to award back pay amounts to a reduction of the penalty from dismissal to a period of suspension.

Such is the case here. While the Board specifically found that Grimes should be disciplined, mitigating circumstances made dismissal excessive, and a lesser penalty appropriate. The Court can not say that such decision was wholly baseless, or without reason so as to require reversal of the Board's decision.

Although Grimes in his complaint did not attack the proceedings before the Adjustment Board, in his response to the Railroad's mo-

tion he argues that the proceedings before the Board were tainted by the Union's breach of its duty of fair representation. While the Court notes that in some cases the breach of the duty of fair representation may undermine the arbitral process, see e.g. Miller V. Gateway Transportation Co. 616 F.2d 272 (7th Cir. 1980) the Court is not of the opinion that this is such a case. Here, Grimes' grievance was processed by the Union, and although there appears to be some question as to the adequacy of his representation at the initial discharge hearing, it is clear from the record filed by the Board that they were aware of these shortcomings. It is also important to note that the Board did find in Grimes' favor albeit not to the degree that either he or the Union sought.

Looking at the record as a whole, as well as the numerous exhibits made part of the Board's record of decision, the Court cannot

say that the Union breached its duty of fair representation so as to undermine the fairness of the arbitral process. That being the case the Court finds that the motion for summary judgment as to the appeal of the decision of the National Railroad Adjustment Board should be GRANTED

Based upon the foregoing the Court hereby ORDERS that:

- (1) Summary Judgment as to pleading paragraph One (1) of the complaint be and hereby is GRANTED in favor of the defendant Railroad.
- (2) Summary Judgment as to pleading paragraph Two (2) of the complaint be and hereby is GRANTED in favor of the defendant Union.
- (3) Summary Judgment as to pleading paragraph Three (3) of the complaint with respect to the defendant Union is GRANTED in favor of the Union. With

regard to the defendant Railroad the motion is GRANTED in part and DENIED in part. Plaintiff may pursue against the Railroad only his claim of retaliation in violation of Title VII, 42 U.S.C. §2000e et. seq.

(4) Summary Judgment as to pleading paragraph Four (4) of the complaint is GRANTED in favor of both the defendant Railroad and the defendant Union.

(5) Summary Judgment as to pleading paragraph Five (5) of the complaint is GRANTED in favor of the defendant Railroad.

IT IS SO ORDERED.

DATED at Evansville, Indiana this 10 day of February, 1984.

Judge Gene E. Brooks
United States District Court
Southern District of Indiana

Form 1

Award No. 7956
 Docket No. 7776
 2-L&N-EW-'79

NATIONAL RAILROAD ADJUSTMENT BOARD
 SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (System Federation
 (No. 91,
 (Railway Employees'
 (Department,
 (A.F. of L.--C.I.O.
 ((Electrical
 (Workers)
 (Louisville and
 (Nashville
 (Railroad Company

Dispute: Claim of Employees:

1. That the Louisville and Nashville Railroad Company removed Upgraded Electrician Apprentice K. C. Grimes from service without just and sufficient cause and in so doing deprived him of his rights to earnings from September 21, 1976, until such time as he is restored to service.
2. That, accordingly, the Louisville and Nashville Railroad Company be ordered to restore Upgraded Electrician Apprentice K. C. Grimes to the Carrier's service with seniority rights unimpaired and compensated for all wage loss commencing with the date of his

about 6 months later, he was working as an Upgraded Electrician.

On the day of the incident, Claimant reported to his foreman that Caboose 6428 would not be serviceable because of a bad light switch and that a replacement switch was not in stock. The foreman found a switch and gave it to Claimant with instructions to use it. The replacement switch given Claimant was a single-pole on and off type, whereas the defective light switch in the caboose was a 3-way switch.

Claimant indicated to his foreman that the installation of the replacement switch would be unsafe. The foreman assured him that the switch was safe and instructed him to use it. Claimant refused and also refused to turn over the switch to the foreman.

At the investigation, Claimant testified that he did not apply the switch because the amperage ratings on the two switches differed; that he was unsure of the results; that he wished to avoid responsibility for damaging company property; that he felt it was his responsibility since he had signed the caboose sheet; and that he retained the switch because he thought it might be used in proceedings against him.

A reading of the record discloses that the foreman told Claimant that he would take responsibility for directing Claimant to use the switch. At the investigation, the following colloquy took place between the Hearing Officer and the foreman:

"Q. Did you observe the amperage reading on the new switch?

A. Yes, I did. The switch was a Bryant single pole toggle switch, with an amperage reading of 10 amps, 125 volts, 5 amps, 250 volts. I handed him the switch and showed him (Claimant) where it read 10 amps, 125 volts and he stated that this was the first time he had seen the 10 amps, 125 volts. He also stated he did not apply the switch because it read only 5 amps, 250 volts.

Q. Isn't the rating of this new switch the same as the switches that are to be applied to all cabooses?

A. The amperage reading on both of these switches are similar.

Q. Is there any reason why this switch could not have been applied to the caboose 6428 from your electrical experience and background?

A. No, with a wiring change the switch that he did not apply could be wired up in the on position and worked on the caboose effectively.

It is not clear from the record that an apprentice with less than 6 months service would know that the new switch could work with a wiring change or that the foreman instructed him at the time that a wiring change would make the switch operable and safe.

No showing has been made that installation of the switch given Claimant by the foreman would be unsafe, or that it placed Claimant in physical jeopardy. It is well understood that in case of personal danger to his health or safety, an employee is not obliged to comply with a

supervisor's instructions, but the record is barren of evidence of personal danger to Claimant.

We find in this case that although Claimant failed to comply with the foreman's instructions, we must recognize certain mitigating circumstances. Both the Claimant and the foreman overreacted to the situation, no doubt due in part to the fact that both were relatively new and inexperienced on their respective jobs. Claimant had been in the Company's employ for less than 6 months at the time of the incident. Moreover, although hired as an apprentice, he was working at the time as an Upgraded Electrician. The foreman was not Claimant's regular foreman but was filling a vacation vacancy.

Claimant's response and reaction to the Foreman's instructions were misguided, but not malicious. Even if he honestly believed that the switch given him was not safe he should have installed it when so directed by the foreman, particularly when the foreman advised him that he would take responsibility.

Generally speaking, it is the duty of employees to obey others. A cardinal principle in the law of the shop -- unless there is threat to an employee's life or limb -- is to "obey now, grieve later". Claimant should have complied with the foreman's request.

Based on a reading of the record, we have reached the following conclusion: Claimant's refusal was misguided, rather than capricious, stemming from his inexperience as an Upgraded Electrician which left him unsure and uncertain as to the safety risks involved in substituting one type of switch for another. The record

indicates that he did try to seek advice from nearby employees concerning the difference in the switches. Given that he had less than 6 months service at the time, having been hired as an apprentice, and the other factors hereinabove cited, we find mitigating and extenuating circumstances leading us to conclude that the discipline or dismissal was excessive, and that a lesser penalty is appropriate.

In reaching this conclusion, we do not condone Claimant's conduct. We caution Claimant that by this decision he is put on notice that he must comply with reasonable instructions from his supervisors and that he has no right to refuse to comply with such instructions in the absence of any probative evidence or valid reason that such instruction or order is arbitrary, unreasonable, discriminatory, or would subject him to clear and evident danger. His failure to do so will make him subject to discipline.

Carrier is to be commended for providing an opportunity for apprentices to upgrade themselves, but in our judgment this case emphasizes the need to consider an apprentice's capability to respond to the needs, requirements, and responsibilities of an upgraded position before such assignments are made.

Our decision then, is that the Claimant shall be reinstated to service with seniority rights unimpaired, but without compensation for time lost subsequent to the date of his dismissal.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Michael S. Wolly, 1125-15th St. N.W. Suite 400, Washington, D.C. 20005, (202) 833-8855, Rodney H. Grove, 220 N.W. Fourth St., P.O. Box 3261, Evansville, Indiana 47731 (Local 1353) (812) 423-4433, F. Wesley Bowers, Bowers, Harrison & Kent, 49 Permanent Savings Bldg., Evansville, Indiana 47708, 426-1231 and Galen J. White, Jr., Boehl, Stopher, Graves & Deindoerfer, Louisville Trust Bank Bldg., One Riverside Plaza, Louisville, Ky. 40202

UNITED STATES CONSTITUTION

AMENDMENT VII [1791]

In Suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

"The right to trial by jury is neither extended nor restricted but is preserved inviolate under rules. This right, as heretofore, is dependent upon The Seventh Amendment to the Constitution, the pertinent provision of which reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved"

As used in (Fitzpatrick v Sun Life Assur. Co. of Canada 1 F.R.D. 713)

TITLE 45 § 153 First (P)

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to

designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon the selection of such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment.

The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

FEDERAL RULES OF CIVIL PROCEDURE

Costs, see rule 54 and notes of Advisory Committee under the Rule, Title 28, Appendix, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure as governing the procedure in all suits of a civil nature whether cognizable as cases at law or in equity, see rule 1.

Mandamus as abolished but relief yet available by appropriate action or motion under Federal Rules of Civil Procedure, see rule 81 and Notes of Advisory Committee under the rule.

One form of action, see rule 2.

Pleadings allowed, see rule 7.

UNITED STATES CONSTITUTION

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under thier Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and a Citizen of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, of Forfeiture except during the Life of the Person attained.

Under USCA Constitution Article III, § 2 distinction between Law and Equity is to be observed. (Phillip Petroleum Co. v Johnson (1946, CA 5 Tex) 155 F 2d 185, Cert. den 329 U.S. 730, 91 L Ed 632, 67 S. Ct. 87.

FOR THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES
PETITIONER

V

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY
RESPONDENT

) 6-11-87
)
)
) "RETURNED" FROM
) APPEAL OF
) CIVIL ACTION NO.
) EV 81-130-C
)

PETITION OR APPLICATION--FOR ORDER
CONFIRMING AWARD--

TRADE ASSOCIATION ARBITRATION AGREEMENT

I. JURISDICTION

1. Jurisdiction is founded upon the Rail-
way Labor Act, 1934 45 USC § 151 et seq.,
Chapter 8, as amended; Federal Rules of Civil
Procedure 81(b), 69(a), 8(a) (1), 9 USCA § 1
et seq., Indiana Statute, Uniform Arbitration
Act Chapter 1 and 2, 34-4-1-1 et. seq, 34-4-

2-1 et seq., and Chapter 29 Indiana Statute 8-4-29-1 et seq., without respectd to the amount in controversy and without regard to the citizenship of the parties. (See Exhibit "C" paragraph I.)

II. NATURE OF THE PROCEEDING

2. This is a proceeding for order confirming award of the National Railroad Adjustment Board numbered 7956, Docket No. 7776. Attached is a copy and marked Exhibit "A".

3. This is also a proceeding for compensation and benefits with respect to job classifications, seniority status, apprenticeship status, assignments, promotions, and terms, conditions and privileges of employment agreed to. Attached is a true and correct copy of the Agreement and is marked Exhibit "B".

4. This is also an action brought by an employee against his employer, Louisville and Nashville Railroad Company (herein known as Respondent). The Respondent as party to a

binding decision of a referee, impaired the Petitioner's seniority rights in a breach upon the decision of the aforementioned award when the Respondent refused to abide by the award.

5. This is also a proceeding, appealed from the United States District Court, for the Southern District of Indiana, Evansville Division Complaint No. EV-81-130-C, filed June 11, 1981.

6. Enforcement on the award was appealed to the 7th Circuit Court of Appeals in Chicago, Illinois. Then from the 7th Circuit Court of Appeals to the Supreme Court of the United States.

7. The award is now returned to the named District Court herein within the meaning of U.S.-Sheet Metal Workers' Intern. Union, AFL-CIO, Local Union 17 v. Aetna Steel Products Corp., D.C. Mass, 246 F. Supp. 236, affirmed, C.A., 359 F. 2d 1, certiorari denied 87 S.Ct.

86, 385 U.S. 839, 17 L.Ed. 2d 72--Columbian Fuel Corp. v. Warefield National Gas Co. D.C. W. Va., 72 F. Supp.839. (cases).

III. THE PARTIES

8. The Petitioner is a black male individual residing in the city of Evansville, county of Vanderburgh, state of Indiana, who at all times material to this proceeding, complied with condition precedent, as an employee of the Respondent, or as a wrongfully discharged employee of the Respondent and was a member of the union.

9. The Respondent, Louisville and Nashville Railroad Company, is a corporation maintaining its principal place of business at 908 West Broadway, Louisville, Kentucky 40203 and is doing business in the state of Indiana.

10. Respondent "Company" is an employer within the meaning of 42 USC § 2000 e-(b), 45 USC § 151 and is engaged as a carrier within the meaning of 45 USC § 151 in an industry

affecting interstate commerce within the meaning of 42 USC § 2000 e-(h), and has maintained fifteen (15) or more employees at all times relative to this action.

11. See Exhibit "C" paragraphs 8, 9 and 10 on the union as a party to the complaint as filed June 11, 1981. On 5/6/82, Mag Endlsey entered a Summary Judgment, "by agreement of parties the Court ordered and decreed that the plaintiff take nothing by way of VII pleading para 3 of complaint with respect to the deft., local 1353, etc." Attached is a copy of said proceeding marked Exhibit "XB".

IV. STATEMENT OF THE CASE

12. Petitioner is a party to the entitled arbitration proceeding herein and makes this application for order confirming the award of the referee made herein and directing the entry of judgment in its favor upon said award.

13. In arbitration proceedings a referee, pursuant to rules of the General Arbitration Council of the National Railroad Adjustment Board Second Division, an award, duly acknowledged and certified, was made on the 13 day of June, 1979. The award is attached and marked Exhibit "A".

14. The said arbitration proceedings were had pursuant to provisions of a contract designated agreement between Louisville and Nashville Railroad Company and its electrician helpers and apprentices, (represented by)--The International Brotherhood of Electrical Workers, (operating through) System Federation No. 91, Railway Employees Department American Federation of Labor, Mechanical Section thereof, (covering) rules and working conditions effective September 1, 1943 (with revisions through January 1, 1966), entered into between

Petitioner's representative and Respondent. Attached is a true and correct copy marked Exhibit "B" and made a part thereof.

15. The aforementioned contract between Petitioner and Respondent contains the following provisions in respect to arbitration:

Rule 32 of the Agreement:

32(a) Should an employee subjected to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be handled in accordance with the provisions contained in Appendix "D", Article V, by the duly authorized committee or their representative. If a stenographic report of investigation is taken, the committee shall be furnished a copy. If the result still be unsatisfactory, the duly authorized representative shall have the right of appeal, preferably in writing,

with the higher officials designated to handle such matters in their respective order, and conference will be granted within 15 days of application unless otherwise agreed upon.

Rule 32(a): Appeals:

Should the highest designated railroad official or his authorized representative, and the duly authorized representatives of the employer, as provided in Rule 32 fail to agree, the case may then be handled in accordance with the Railway Labor Act.

Pursuant to the agreement at Appendix "D" Article V at (c), it provides that:

All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine months from the date of said officer's decision, proceedings are instituted by the employee or his duly

authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act.

16. Moreover, the mutual obligation of the agreement at Appendix "D" Article V following section 3 second of the Railway Labor Act provides that:

"Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employers, all acting through their representatives, selected in accordance with the provisions of this Chapter from "mutually agreeing to the establishment of system, group, or regional boards of

adjustments, for the purpose of adjusting and deciding disputes of the character specified in this section,"

Accordingly, it is provided under Section 3(h) of the Railway Labor Act that:

"Second Division: To have jurisdiction over disputes involving...electrical workers, carmen, the helpers and apprentices of all the foregoing coach cleaners, power house employees, and railroad shop laborers."

As provided for under Section 3 first (S):

The second division is located at the National Railroad Adjustment Board 175 W. Jackson Street, Chicago, Illinois 60604.

In accord with the aforementioned provisions of the Railway Laobr Act at Section 3 second it states:

"Such awards shall be final and finding upon both parties to the dispute."

17. A mutual promise to abide by the award, when there is agreement to follow the Railway Labor Act and the rules of the National Railroad Adjustment Board as shown herein:

18. Petitioner and Respondent consent to the agreement followed herein and the Railway Labor Act, which provides at Section 3 first (P) jurisdiction of the District Court of the Southern District of Indiana, Evansville Division.

"If a carrier does not comply with an order of a division of the adjustment board within the time limit in such order, the Petitioner or any person for whose benefit such order is made, may file in the District Court of the United States for the district in which he resides...a petition setting forth briefly the causes for which he claims relief."

19. The Petitioner and Respondent consented in the agreement to follow Section 3 second of the National Railway Labor Act which provides statutory process as it relates to Federal Rules of Civil Procedure as governing the procedure in all suits of a civil nature whether cognizable as case at law or in equity, see rule 1 Section 3 Second further provides that "relief... is available by appropriate action or motion under Federal Rules of Civil Procedure, see rule 81 "Rule 81(b), 69(a) (See in particular cases "as to which practice and procedure of the state is required to be followed."

Accordingly, Indiana Statute 32-4-2-16 Sec 16(a) as to process or notice of motion or any application to the court including application for judgment upon an award, it is provided:

"Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in

the manner and upon the notice provided by law or by rule of court for the making and hearing of motions unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in civil cases. (See Indiana Rules of Trial Procedure, Rule 4 et seq.)

20. The arbitration proceedings aforementioned were duly initiated under the terms of the agreement and in accordance with the terms thereof by Petitioner herein. (See Exhibit I-9(a)" and Ind. Jacobs V. Moffatt, 3 Black F. 395; Wis-Brace V. Stacy. 14 N.W. 51, 6 Wis, 148.

21. The Respondent participated in said arbitration by agreeing to the submission, appointing an arbitrator and asserting a counterclaim. Annexed hereto and marked Exhibits "D through R(b) et. seq." and made a

part hereof is the letter of the Respondent submitting to the arbitration and appointing an arbitrator. (See Exhibits "P(a)", "P(b)" and R(b) attached and marked.) (Also see Exhibits J and I-12(c) attached hereto and marked).

22. The grievance procedure was initiated by an informal investigation by Mr. B. J. Allerellie, General Foreman as designated in Appendix "D" Article V 7(c) of the agreement. Known as Exhibit "B".

The investigation was held August 18, 1976. (See the formal investigation transcript at p. 3 third ans, a true and correct copy is attached and marked Exhibit "D".)

23. From the informal investigation, Mr. Allerellie acted on the difference of opinion investigated with a letter of reprimand to the Petitioner for insubordination. (See Exhibit "D" third answer.)

After the letter of reprimand initiated by General Foreman Allerellie for the insubordination charge.

24. On August 25, 1976 Master Mechanic E. M. Baskette preferred charges from the letter of reprimand issued by General Foreman Allerellie as a matter appealed. (See Exhibit "E").

25. The action to prefer charges against the Petitioner by E. N. Baskette Master Mechanic was exceptance of the appeal, for process by the Master Mechanic. The preferred charges caused the formal investigation dated September 8, 1976, that represented the contents of Exhibit "E".

26. The formal investigation was conduted on September 8, 1976, with Master Mechanic E. N. Baskette as the presiding representative for the carrier. The Petitioner was repre-

sented by the Local Chairman B. E. Knight. The formal investigation is attached and marked Exhibit "D".

27. From the investigation Master Mechanic Baskette appealed the decision to the superintendent of the division, Mr. A. C. Jones, Jr., and upon the recommendation initiated by Exhibit "E", it was decided that:

"For this offense, you are hereby dismissed from service of the L&N Railroad Company"

The letter was issued September 21, -1976. (A true and correct copy is attached and hereby known as Exhibit "F")

28. Following the dismissal of the claimant, a claim was initiated in behalf of the Petitioner by the local chairman. The claim stated:

"In view of the foregoing, we herewith institute claim on behalf of Mr. Grimes that he be restored to service with all

rights, privileges and benefits unimpaired and that he be compensated for all time lost as a result of the action taken against him by the carrier."

A true and correct copy is attached and marked Exhibit "G".

29. Thereafter a counterclaim was issued by Superintendent A. C. Jones, Jr. Attached is a copy and marked Exhibit "H".

After the initial claim, the dispute as handled by the Petitioner's representative was timely presented and progressed to the highest designated mechanical officer pursuant to Appendix "D" Article V 7(c) a Mr. C. D. Leddon.

30. In a letter dated January 24, 1977, C. D. Leddon denied the claim for the Petitioner presented in letter December 27, 1976. The letters are attached and marked Exhibits "I-2", "I-4".

31. The aforementioned denial of the Petitioner's claim culminated the final step to the designated Chief Mechanical Officer provided under the agreement at Appendix "D" Article V 7(c).

32. The Chief Mechanical Officer's refusal to adjust the dispute (1) evoked appeal pursuant to the accepted and established procedure to arbitrate before the National Railroad Adjustment Board, and (2) provided a basis for sufficient consideration to support the procedure established by this agreement.

33. Thereafter, the Petitioner's duly authorized representative submitted a letter to C. D. Leddon providing sufficient notice that:

"Be advised that we do not accept your decision and/or declination of the here-involved claim and consequently will take

the action necessary to make further appeal pursuant to the accepted and established procedure."

34. Again the established procedure is to arbitrate the dispute before the National Railroad Adjustment Board. A copy of the letter is attached and marked Exhibit "I-5".

35. Following sufficient consideration Chief Mechanical Officer C. D. Leddon submitted to arbitrate before the N.R.A.B. As mutual assent in behalf of a mutual obligation agreed upon with full knowledge of the procedure provided for in the agreement and the Railway Labor Act.

36. Pursuant to the agreement of Appendix "D" Article V at 7(c). The highest designated officer of personnel was W. C. Moore. Mr. Moore was provided with a letter dated February 28, 1977, from the Petitioner's duly authorized representative, C. C. Williams, Jr., General Chairman of System Council No. 6,

International Brotherhood of Electrical Workers. (A copy of the letter is annexed hereto and marked Exhibit's "I-6(a)" and I-6(b)."

37. The letter was an appeal from Mr. C. D. Leddon, Assistant Vice President, Mechanical by General Chairman Williams to Mr. W. C. Moore, Assistant Vice President, Personnel and Labor Relations. The letter asserted:

"In view of the foregoing, we respectfully request that you take the action necessary to cause Mr. Grimes to be restored to service with all rights, privileges and benefits unimpaired and that he be compensated in full for all time lost as a result of the unfair and unwarranted action taken against him by the carrier."

38. In response, after sufficient consideration, a letter dated April 26, 1977, and hereby known as Exhibit "I-7" which is

attached, was initiated by W. C. Moore to C. C. Williams, General Chairman. The letter in response to Mr. William's February 28, 1977 letter declined a claim by Williams to adjust the dispute on the property. The letter said in pertinent part:

"In the circumstances, the claim appealed by you is respectfully declined in its entirety."

39. Thereafter, following sufficient consideration, on October 31, 1977, a letter initiated by General Chairman Williams was presented to Mr. W. C. Moore, Assistant Vice President of Personnel and Labor Relations. (A true and correct copy is attached and hereby known as Exhibit "I-8(a)" "I-8(b)."

40. The letter referenced the April 26, 1977 letter declining the disputed claim by W. C. Moore.

41. Moreover, it stated that, following several conferences said claim was still declined by W. C. Moore. The letter gave notice that the dispute would be appealed to the next step which is arbitration before the National Railroad Adjustment Board. The letter said:

"Let this serve to advise that under no circumstances do we accept your decision in this matter and will take the action necessary to give further handling to this case and/or claim in accordance with the established and accepted procedure, as set forth in Rule 33(a) of the current controlling agreement."

Rule 33(a) provides that:

"Should the highest designated railroad official or his authorized representative and the duly authorized representative of the employees, as provided in Rule 32

fail to agree, the case may then be handled in accordance with the Railway Labor Act."

Pursuant the the Railway Labor Act at § 153 Second, it provides that:

"Nothing in this section shall...prevent...for the purposes of adjusting and deciding disputes of the character specified in this seciton." If "dissatisfied with such arrangement, it may upon ninety days notice to the other party elect to come under the jurisdiction of the Adjustment Board." (See Power of Attorney exhibit "I-9(a)"). The letter dated April 26, 1977, as exhibit "I-7" was a final decline by Respondent, and notice to file submission by Petitioner's representative was dated December 28, 1977, and herein called Exhibit "I-12(a)" and I-12(b)".

42. The appeal to W. C. Moore culminated the final step pursuant to the agreement at Appendix D Article V 7(c) and the procedure described under Section 153 first (I).

43. Mr. W. C. Moore in declining the claim, submitted to arbitration before the National Railroad Adjustment Board. The submission followed participation and sufficient consideration while mutually assenting to a mutual obligation agreed upon with full knowledge of the procedure, after declining the claim.

44. The Respondent participated in the said arbitration by agreement (see Exhibit "B", Appendix D Article V) to the submission through mutual assent. Attached to this application are the Exhibits "D" through "I-20" showing said mutual assent as progressed to the National Railroad Adjustment Board.

44. The Respondent participated in the said arbitration by agreement (see Exhibit "B", Appendix D Article V) to the submission through mutual assent. Attached to this application are the Exhibits "D" through "I-20" showing said mutual assent as progressed to the National Railroad Adjustment Board.

45. Moreover, Respondent participated in said arbitration by asserting a counterclaim within the proceeding. Annexed hereto and marked Exhibit "J(a) -J(b)". The Petitioner asserted a claim within the proceeding that herein is known, attached and marked as Exhibit "I-12(c)" and Exhibit "R(b)."

46. Respondent participated in said arbitration by appointing an arbitrator. (See attached copies marked Exhibit "P(a)" and "P(b)" and made a part hereof is a letter of the National Railroad Adjustment Board (1) acknowledging notice in a January 19, 1979 letter that stated that the board was "dead-

locked"; (2) that request for hearing before the division with the referee present on this case has been granted; (3) showing copies mailed to the selected "Referee Weiss"; (4) and as Exhibit "P(a)" shows, the selection of a referee was by mutual assent.

Accordingly § 153 First (L) Provides that:

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members as provided for in paragraph (N) of this section, then such division shall forthwith agree upon and select a neutral person to be known as "referee," to sit with the division as a member and make an award."

47. During the arbitration procedure, the Arbitration Board selected individual representatives in accordance with this Section 3

second of the Railway Labor Act to form a committee and arbitrate in accordance with 153 First (K). (See Exhibit "R(b)").

48. The committee messengers were Mr. J. G. Hayes for the Railway Employees Association, and Mr. Vernon for the carrier. The results were:

"Your committee, Messrs. Hayes and Vernon, being unable to agree on an award in this dispute."

49. The Petitioner participated in the hearing before the referee pursuant to 153 First (J) of the Railway Labor Act. (See Exhibit "M" attached hereto.)

50. The referee was duly elected and appointed pursuant to the rules of the National Railroad Adjustment Board. (See § 153 second Railway Labor Act.) The referee was duly sworn (by affirmation) the hearing held, (see Exhibit "M" attached hereto) and the award Number 7956, Docket 7776 duly made. (See

Exhibit "A".) The referee was selected in accordance with the affirmation clause under § 153 first (L) of the Railway Labor Act. See page 2 of the award, Exhibit "A", where it states:

"The Second Division consisted of the regular members and in addition Referee Abraham Weiss when the award was rendered."

51. Thereafter, on June 13, 1979, an order and award was issued by the National Railroad Adjustment Board, Second Division. (See Railway Labor Act, Section 3 First (N), (O). The decision award, numbered 7956, Docket No. 7776 is attached and marked Exhibit "A". The Board's decision being (a) that the penalty of dismissal under the circumstances was excessive, (b) that the claimant (Petitioner herein) was to be reinstated to service with his seniority rights unimpaired, but (c) denied him compensation for three years wages and

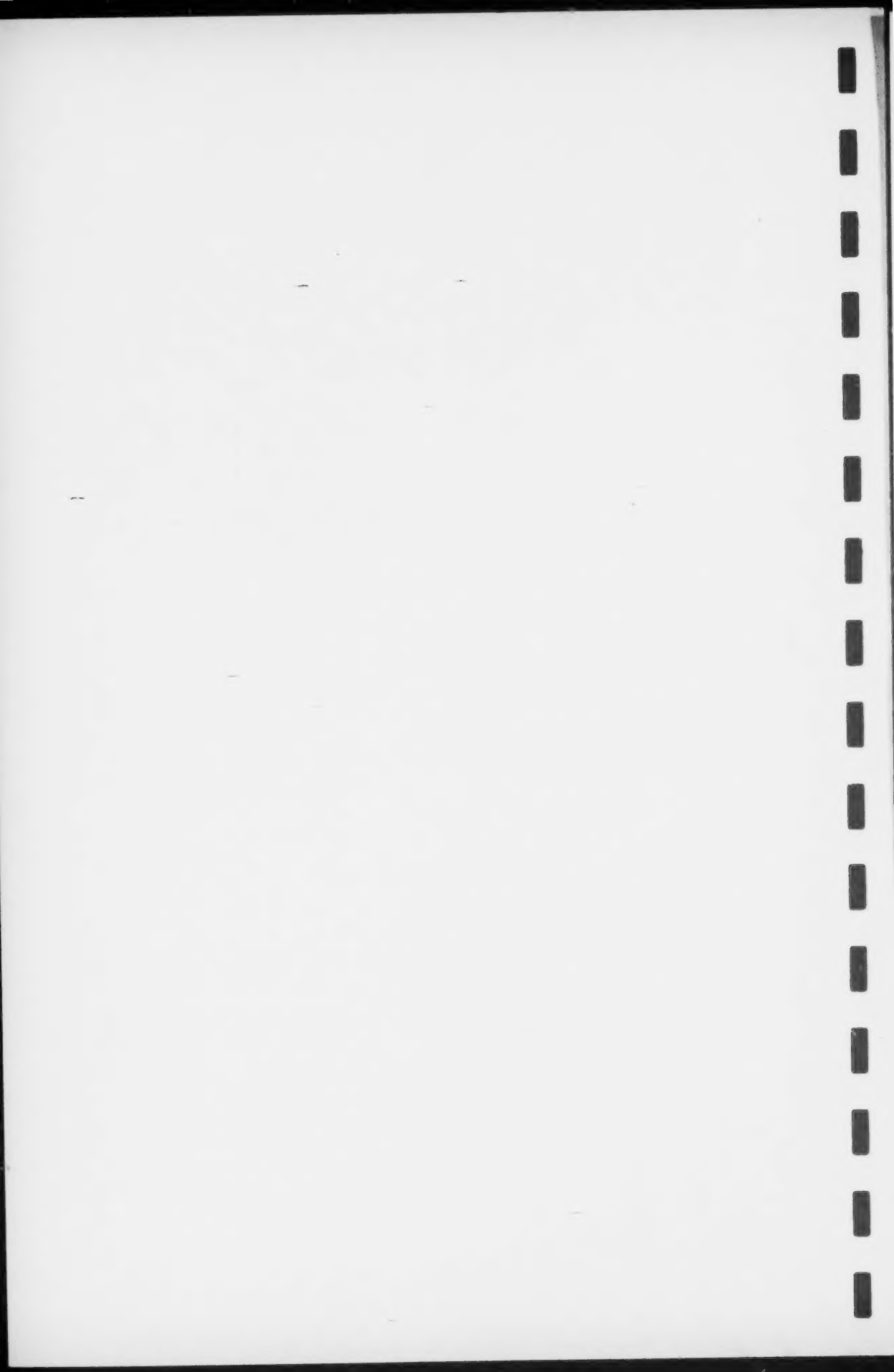
benefit since the date of the Petitioner's dismissal. Such decision was the final step in the administrative remedies required to be exhausted under the guidelines established by "Agreement" and the Railway Labor Act.

52. Upon reinstatement July 9, 1979, the Petitioner's seniority rights were impaired, when the Respondent refused to abide by the award. (See Memorandum Decision Exhibit "W" attached herto.)

53. This action by the Respondent was a breach of the decision on the award.

54. Following the July 9, 1979 reinstatement the Petitioner timely presented the breach to his duly authorized representative. (A letter of the presentation is attached and marked Exhibit "P(a)".)

55. Thereafter, the breach was progressed to the National Railroad Adjustment Board Second Division. Copies of all



correspondence, making a request to the appropriate parties and to the Board is attached and known as "Exhibits P(a) -p(g)".

56. The National Railroad Adjustment Board's answer to the Petitioner's request for interpretation of the award was that:

"Please be advised that the Railway Labor Act. Section 3 First (m) states in part...the awards shall be final and binding upon both parties to the dispute...." (See Exhibit "P(G)".)

Whereas section 3 first (n) provides in its entirety: "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the and binding upon the parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the board

for "any" harm he may have suffered," and award 10541 (attached as Exhibit "MMM") "Claimant shall be compensated for... the amount he would have received based on his usual assigned working hours." No doubt, the Petitioner was permanently "harmed by the abolished job and loss of remedy. (See Russell v. Bankers Life Co., 46 Cal App. 3d 405, 120 Cal Rptr. 627, 633.)

62. On June 11, 1981, the Petitioner timely filed complaint on the award pursuant to section 3(r), (p) and (q) of the National Railway Labor Act. (A copy of the complaint is annexed herto and marked Exhibit "C") and Ind. Trial rule Procedure 2, 3, 4, 9, Local rule 1, 2, 3, 6,

Section 3 first (P) provides:

"...any person for whose benefit such order is made, may file in the District Court of the United States for the district in

upon request of either party shall interpret the award in the light of the dispute."

57. On March 23, 1981, the Petitioner was provided notice that he would be furloughed on March 30, 1981. A true and correct copy of the notice is attached and is marked Exhibit "T(b)". On March 30, 1981, Master Mechanic B. R. Montgomery, as one who initiated Exhibit "T(b)", abolished the Petitioner's job on March 30, 1981. Attached is a copy and marked Exhibit "T(a)".

58. Based on sworn testimony before a district court judge, Master Mechanic B. R. Montgomery testified as follows: (See Exhibit Triple "U" filed October 17, 1984, here in pertinent part.)

Direct Examination by Mr. White

CAttorney for the Defendent)

Q. "Directing your attention specifically, Mr. Montgomery, to the events of March, 1981, I want to show you a document previously introduced as Defendant's exhibits B and C and ask you if you caused those documents to be sent out on or about March 23, 1981?"

A. "Yes

Q. "Why did you furlough Mr. Gimes?"

A. "Because my superior officers advised me that we would be making forced reduction because of the impending coal strike which was projected for March 23rd."

See Exhibit "XD", p. 53 also.

59. The Respondent's action in abolishing the Petitioner's job affected the cause of the Petitioner the following ways:

1. Impaired seniority rights that were initially impaired upon reinstatement in July 9, 1979, and subsequently, thereafter were made worse by affecting them in an injurious manner.⁴¹

2. Job abolishment, caused a loss to the first part of the remedy known as rule 34 in the agreement (Exhibit "B").

The Petitioner cannot have that which does not exist.

Rule 34 states:

"No employee shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his local chairman will be apprised to the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is

found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired."

3. However, the last sentence in rule 34 represents, based on the standards of the National Railroad Adjustment Board, a total, plain, adequate and complete remedy to redress the wrongs herein.

"and compensated for the wage loss, if any, resulting from said suspension or dismissal."

4. A plain, adequate and complete remedy exists in the "Make Whole Principle, as applied in the instant case. The Petitioner with certainty would maximize the working period guaranteed by Public Congressional Law 95-256 through Public Law 93-445 and that is guaranteed by Indiana Code 22-9-2-1 et seq. "Make Whole Principle". (See Hughson Condensed Milk Co. v. State Board of Equalization, 23 Cal.

App. 24281 73 p. 2d 290, 292 and Russell v. Bankers Life Co., 46 Cal App. 3d 405, 120 Cal. Rptr. 627, 633.

5. In response to Mr. B. R. Montgomery's statement that the coal strike, pending for March 23, 1981, was his exclusive reason suggested by his superiors.

Pursuant to a case in point: Island Territory of Curacao v. Solitron Devices, Inc. 356 F. Supp. 1 (1973).

It was pointed out that "an isolated incident (p. 10, 11) "is not a standard by which to judge the 20 year contact period."

In the instant case, the "coal strike that was pending" was an isolated incident. It does not represent a standard by which to judge a "continuing contract".

Moreover, by agreeing to a continuing contract (1980 or 1981), the respondent could not have under the current and controlling agreement "not have expected coal strikes." With

30% or more of the local business hauling local coal, a coal strike (as pointed out in Exhibit Triple "U") that is "impending" can never be "force majeure" an external cause not foreseeable at the time "of the abolished job." Ibid see Island Territory of Curacao v. Solitron, 356 F. Supp. 1 (1973).

60. The coal strike does not alter the fact that the Petitioner's seniority rights were impaired upon reinstatement from July 9, 1979.

61. Nor does the abolished job diminish the fact that the place of submission and arbitration over a long line of case precedent has allowed compensation. As award 10652 points out in reference to "lost work opportunity" "from a breach of contract" "we follow the long line of award and court decisions that the breach of contract entitled the wronged party" (See Exhibit "W", District Court Memorandum Decision) "to compensation

which he resides"...A petition setting forth the causes for which he claims relief."

Section 3 first (q) provides:

"any employee...is aggrieved by any of the terms of an award...may file in any United States District Court in which a petition under paragraph (P) could be filed."

Section 3 (r) provides:

"Allocations at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board and not after."

63. Moreover, pursuant to Indiana's Uniform Arbitration Act, under Statute 34-4-2-12 and 16 it provides:

"concerning confirmations and objections to awards the Federal Act (9 USCA §1 et seq.) and the Indiana Act (this chapter) follow the same general scheme."

Indiana Statute 34-4-2-16 provides:

Sec. 16. "Except as otherwise provided an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the services of a summons in civil cases."

64. In the complaint filed June 11, 1981, two issues were raised on the award by motion, Indiana Trial Rule Procedure 8(A).

(1) "Vacate, set aside and declare void and unenforceable, that section of the award...that... denies to the plaintiff lost wages, benefits and increments for the period from September 22, 1976, until July 9, 1979. ("See Exhibit "C" paragraph D under prayer for relief.")

(2) "C. Order that a preliminary and permanent injunction issue directing that Defendant "Company" comply with the decision of the National Railroad Appeals Board and restore to him all of his seniority rights and apprenticeship status unimpaired and directing full and complete compliance with the said decision and award as to those provision."

65. On August 6, 1981, the Respondent herein filed an answer to the complaint. The response "specailly denied" (see Ind. Code: 8-4-29-2, Indiana rules of Trial Procedure 8(B), 7 A(1), allegations (A-C) of paragraphs 23 of the Petitioner's complaint. (See paragraph 17 of the Respondent's answer attached as Exhibit "U" filed and dated August 6, 1981.

66. The answer in part denied the following sections of paragraphs 23 of the complaint: (See Indiana Trial Rule Procedure 8(B).)

- "(a) that the penalty of dismissal under the circumstances was excessive,
(b) that the Claimant (Petitioner herein) was to be reinstated to service with his seniority rights unimpaired but
(c) denied him compensation for the three years lost wages and benefits since the date of his dismissal."

67. The issues on the award raised the following questions concerning (b) of paragraph 23 of the complaint in the Respondent's special denial. When the awards decision states "claimant (Petitioner herein) shall be reinstated to service with his seniority rights unimpaired" it raised the following question: (1) Did the Respondent herein upon reinstatement to service follow the awards decision, reinstate the Petitioner and not impair his seniority rights? And did the National Railroad Adjustment Board in its decision confine itself or conform with mat-

ters within the scope of the Board's jurisdiction by its failure to award the Peitioner his lost wages in view of the excessive penalty as construed by the arbitrator under the circumstances of the award?

68. On September 17, 1981, the Executive Secretary of the National Railroad Adjustment Board filed a true and correct copy of the record upon which the award herein was based. (See Exhibit "XB" attached.)

69. On July 9, 1982, notice was provided on the award 7 times in a summary judgment hearing held on the defendant's motion to Count V of the complaint. See summary judgment hearing transcript filed March 22, 1984. See Indiana Rules of Trial Procedure 8(A)(1) (2) (F). (Attached is a copy of said transcript and marked Exhibit "V".)

70. On May 6, 1982, Magistrate Endsley in a summary judgment dismissed all claims against the union's Local 1353. (See Exhibit "XB") pleading under local rule 10.

71. On February 10, 1984, District Court issued order on the issues raised on the award. (Attached is a copy of the order and marked Exhibit "W".)

72. On issue (2) the appeal of NRAB decision, the court granted a motion to the Defendant (Respondent herein), "for summary judgment as a matter of law as to this claim on the basis that the scope of review of this court is limited by the Railway Labor Act and that the "Petitioner, Grimes" has not demonstrated that the decision should be set aside."

73. On issue (1) the first issue of impairing the Petitioner's seniority rights upon reinstatement to service, it was concluded in memorandum decision:

"At the time of his (the Petitioner's) dismissal, his position was that of an "upgraded electrician apprentice." "Grimes returned to work on July 9, 1979, as an "electrician apprentice" rather than an "upgraded electrician apprentice" and although it is not entirely clear, it appears that his seniority rights may have been impaired."

74. Pursuant to the decision on the award, impairment of the Peitioner's seniority rights is a "refusal to abide by the award" (See Cal-Wetsel v. Garibaldi. 23 2d 5 24, 159 C.A. 2d.), when the awards decision states:

"Claimant (Petitioner) is to be reinstated to service with his seniority rights unimpaired."

75. Following the Feburary 10, 1984 order, the Petitioner filed notice pursuant to 28 U.S.C. 1292(b), 7th Cir. Rul 1. 4(b), 5(a),

5(b) for interlocutory appeal of the February 10, 1984 order denying paragraph (D) of the complaint of a:

"declaratory judgment, vacating, setting aside and declaring void and unenforceable that section of the award of the National Railroad Adjustment Board, numbered 7956, Docket No.7776, insofar as it constitutes an excessive penalty and that it unjustly arbitrarily and discriminately denies to Plaintiff (Petitioner) his lost wages, benefits and increments for the period from September 22, 1976, until July 9, 1979"

76. Notice was filed March 9, 1984. (A copy of the notice is attached and marked Exhibit "X".)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES,)	
	)	FILED
PLAINTIFF)	
	)	JULY 2, 1987
v.)	
	)	CAUSE NO.
	)	EV 81-130-C
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY)	
)	
DEFENDANT)	

DEFENDANTS MOTION TO DISMISS AND
MOTION FOR INJUNCTIVE RELIEF

Defendant, Louisville and Nashville Railroad Company, by counsel, moves the Court to dismiss plaintiff's "Petition for Confirmation" filed in this Court on June 11, 1987 on the following grounds:

1. The Petition is defective under Fed. R. Civ. P. 8.
2. The doctrine of res judicata and law of the case.
3. The petition is barred by the two (2) year statute of limitations under the Railway Labor Act.

4. The Court lacks jurisdiction over the person of this defendant.

Defendant, by counsel, further moves the Court for an Order permanently enjoining the plaintiff from filing in this Court any further pleadings alleging any matters asserted or which could have been asserted in his Complaint and in the Petition without an Order of the Court, and further directing the Clerk of this Court not to accept any such pleadings for filing without an Order of this Court.

for failure to comply with the Rule. See Crumpacker v. Civiletti, 90 F.R.D. 326, 329-331 (N.D. Ind. 1981).

For the reasons that follow, he should not be allowed to plead over.

II. Grimes is Barred by Res Judicata and Law of the Case from Petitioning this Court to Confirm the NRAB Award.

The doctrine of res judicata bars Grimes from asserting in this action or in any separate action that the award of the NRAB of June 13, 1979 is now subject to judicial enforcement against the L&N. Under the doctrine of "claim preclusion" Grimes is barred from raising claims or issues that were raised or could have been raised in this action or any prior action between the parties. The complaint of Grimes has been dismissed by final judgment of this Court. That dismissal has been affirmed by a decision of the Seventh Circuit Court of Appeals which stated affirmatively, with respect to the issue Grimes now seeks to reassert, that Grimes waived that issue.

The Seventh Circuit did not remand the case for further proceedings in this Court. The matter cannot now be re-opened, even if Grimes has started a separate action and caused a summons to be issued against the L&N. For discussion of the principles of res judicata

in this Circuit, see Gasbarra v. Park-Ohio Industries, Inc., 655 F. 2d 119, 121 (7th Cir. 1981); Diaz v. Indian Head Inc., 686 F. 2d 558, 562 (7th Cir. 1982). See also 1B Moore's Federal Practices 0.405 (1984). In the prior proceeding, the principle of res judicata should apply with equal force in this case. Further, if this Court were to view this issue as one of law of the case, under that doctrine this Court would be required to conclude, as did the Seventh Circuit, that Grimes has waived any claim for enforcement of the NRAB award. See Gertz v. Robert Welch, Inc., 680 F. 2d 527 (7th Cir. 1982).

III. Grimes is Barred by the Statute of Limitations from Seeking Enforcement of the NRAB Award.

Under the Railway Labor Act an action to enforce an award of the National Railroad Adjustment Board must be begun within two years from the time the cause of action accrues. 45 U.S.C. § 153 (first) (r). The NRAB

decision was rendered June 13, 1979. Grimes was reinstated shortly thereafter and complained that he was not being granted his seniority rights.

His original complaint was timely filed, but that action was dismissed in a final judgment rendered by this Court in September 1984 and affirmed by the Seventh Circuit Court of Appeals in 1985.

In filing the instant Petition, Grimes neither obtained an order of the Court which would allow him to relate back his Petition under Fed. R. Civ. P. 15; nor did he cause a summons to be issued. Fed. R. Civ. P. 4. This case on the docket is closed.

FOR THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES	)	FILED
PETITIONER	)	July 16, 1987
)	
V	)	"RETURNED" FROM
		APEAL OF
LOUISVILLE AND NASHVILLE	)	CIVIL ACTION
RAILROAD COMPANY	)	NO. EV 81-130-C
RESPONDENT)	

RESPONSE TO: DEFENDANT'S MOTION TO DISMISS
AND MOTION FOR INJUNCTIVE RELIEF WITH
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
AND FOR INJUNCTIVE RELIEF.
FILED JULY 2, 1987

RESPONSE TO: INTRODUCTION

Contrary to the Defendant's assertion "no order of this court allowed this petition to be filed and no summons was issued."

This Court issued on February 10, 1984, and September 14, 1984, memorandum decision in summary and final judgment, which provided a basis for "jurisdiction, to enforce a judgment previously obtained in the same Court." (See paragraph 2, p. 27 of this petition filed June

11, 1987, and Exhibits "W", "EE" attached to petition and this response; also see Klarges v. Cohen, 1945, C.A. 2 NY 146 F. 2d 641.)

A summons was issued as part of the complaint filed on the enforcement issue on June 11, 1981. (See the record, also attached is a true and correct copy of the summons herby known as Exhibit "XE".)

The confirmation petition is a part of the process that sought enforcement initially in complaint. (See Exhibit "C" under Prayer for Relief at paragraph C attached to the petition filed June 11, 1987.)¹

RESPONSE TO: ARGUMENTI. THE PETITIONER VIOLATES F.R.C.P. 8.

The Respondent asserts: "The Petitioner fails to comply with Rule 8 of the Federal Rules of Civil Procedure which require that such a pleading give notice of the claim and its grounds simply, concisely and directly."

"In a statutory arbitration proceeding, no notice need be given of the filing of the award or entry of judgment thereon, where the statutes merely provide for the filing of the award with the clerk of court and authorize him to enter judgment thereon without imposing any requirements of notice." (Colo - West v. Duncan, 210 p. 699, 72 Colo. 253.)

In this case, a summons was issued with complaint.³ The complaint as an initial step is to seek affirmation of the award.⁴ The procedure thereafter is "continuous (including

confirmation), not separate."⁵ Thus, entry of judgment to confirm the award is clerical, without imposing any requirements of notice.⁶

State law, under the Federal Arbitration Act is to be applied to confirmation of an award only when "there was a scarcity of Federal cases in point, state practice would be considered in construing this section and sections 10 and 11 of this title" 9 et seq.

UNITED STATES COURT
OF APPEALS
FOR THE SEVENTH CIRCUIT

File No. 88-1381

KENNETH C. GRIMES, APPELLANT

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLEE

Appeal From the United States District
Court
Southern District of Indiana
Evansville Division

Honorable Gene Brooks
Presiding Judge

BRIEF FOR APPELLANT

KENNETH C. GRIMES
Pro Se For Appellant
621 East Gum Street
Evansville, IN 47713
1-812-423-1600

April 9, 1988

Claim when there is no basis in fact to support it is an error and an abuse of the Court's discretion.

II. Reasons the District Court's
Equitous Ruling Violated the Parties Legal
Basis When the Court's Judgment Dismissed
Plaintiff's Motion to Confirm in a Abuse
of Discretion

The District Court's acceptance of the Defendant's res judicata claim, in dismissing the Plaintiff's motion to confirm the award gave cause to a judgment in equity.

The primary reason the judgment is one of equity is that there is no basis in fact or law.

If there is no basis in fact or law to support the judgment, it is more than highly probably that the Court's judgment was intended to be one in equity.

The Court's intent is apparent in several inconsistent acts following the February 10, 1984 judgment where the Court's action established rule, on the seniority rights impairment issue. Rule, the final step before a motion to confirm the award in judgment for monetary damages.

That Court's intent is as follows:

(1) From February 10, 1984, to September 14, 1984, two issues existed simultaneously in the District Court in this case: (1) the retaliation claim,⁹¹ and enforcement issue.⁹²

The Court restricted the proceeding to the sole issue of retaliation. (See September 14, 1984 judgment, pages 3 and 8.)⁹³

In spite of the Plaintiff's aver to judgment on the award and numerous exhibits filed in support, the Court's ruling on September 14, 1984, was without confirmation of the

award. This caused the Plaintiff to appeal. The intent to deny confirmation of the award was apparent from the Court's silence.⁹⁴

Following appeal, where the Plaintiff asserted his arbitrational right, the Plaintiff on June 11, 1987, filed a petition in District Court pertaining exclusively to confirmation of the award as a judgment for damages.⁹⁵

(2) On September 15, 1987, the Court accepted a res judicata claim that was without a basis in law or fact in dismissing the Plaintiff's motion to confirm.

This apparent improvident use of discretion was purely intended to give equity effect to the judgment. This action was without any basis of support in logic and represented only what some individual or others, though personally fair in this particular situation, without regard to the underlying controlling law.⁹⁶

The judgment was arbitrary and taken without proper consideration of facts and law pertaining to matter submitted.

The law that governs in these matters does not support equity⁹⁷ unless there is no adequate relief at law ⁹⁸ or the facts shown cannot be taken advantage of by law. ⁹⁹ The facts shown in the Plaintiff's petition can be taken advantage of by law. The place of submission and the agreement govern cost.¹⁰⁰

(1) Rule 34, of the agreement, that has been used extensively in this case provides a plain adequate relief in the form of compensation of any lost wages.¹⁰¹

(2) 45 USC §153 first (P)-Provides the Petitioner with fees in the form of attorney fees as a form of relief.¹⁰²

(3) The National Railroad Adjustment Board as place of submission does not have equity jurisdiction. ¹⁰³

To impose equity interference on a situation where there is adequate relief by law violates that law.¹⁰⁴ That, law embodied in the agreement, Railway Labor Act and NRAB is law agreed to by the parties in dispute. To impose equity is to violate both parties' rights, a position the Court as judiciary should not be in through its judgment.

The fact that the Court chose to make a decision in equity is an abuse of the Court's discretion and an error. The end or purpose from this judgment was not justified by and clearly against reason and evidence.

UNITED STATES COURT
OF APPEALS
FOR THE SEVENTH CIRCUIT

File No. 88-1381

KENNETH C. GRIMES, APPELLANT

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLEE

Appeal From the United States District Court
Southern District of Indiana
Evansville Division

Honorable Gene Brooks
Presiding Judge

REPLY BRIEF FOR APPELLANT

KENNETH C. GRIMES
Pro Se For Appellant
621 East Gum Street
Evansville, IN 47713
1-812-423-1600

May 20, 1988

decision" of the NRAB award which is a reference to back pay, not enforcement. For a more specific description of which issue the order was referring to, see the February 10, 1984 order, pages 19 and 20. (See App. XII, Exhibit W.)

The appellant's first appeal was an assertion of arbitrational rights to have the award confirmed in judgment. This appeal is from the dismissal in the District Court Judgment September 15, 1987, of the appellant's right to have the award confirmed in judgment from defendant's *res judicata* claim. This is not a reargument of an earlier right to be heard on the matter, although the appellant seeks restoration of his right and judgment.

Unless waiver debars a party from asserting his arbitration right, it has not been completed. The appellant reasserted his arbitrational right, thereby leaving waiver incomplete.

The arbitration right asserted by the appellant is one which was agreed to by the appellee defendant under Rule 33(a) of the agreement.

There is a distinction between reargument and asserting an arbitration right in completion of a litigated process that has not been decided or completed in accordance with justice and precedence. The Court's Order also stated:

"The Court shall not address the other arguments presented by L & N, for res judicata is properly invoked to warrant a dismissal."

The District Court held exclusively to the res judicata defense asserted by the defendant, an argument from the defendant's July 2, 1987 Brief, that had no basis in fact or law as applied.

What the defendant (appellee) claimed happen did not happen. (1) They claimed the District Court dismissed the enforcement claim. This dismissal does not exist in express terms in the September 14, 1984, or February 10, 1984 judgments. (2) They claim the appellant could have raised the argument to confirm but didn't. This ignores (a) the restrictions placed on the litigants to hold exclusively to the retaliation claim, and (b) it ignores the actual notice provided on appeal and at the retaliation claim trial. Action that is sufficient pursuant to Indiana Rule of Trial Procedure 9(E) and the Supreme Court. (c) Silence created at the hands of the District Court is no ground in which a litigant should lose an arbitrational right.

The District Court failed to make the distinction between asserting an arbitrational right as a means to a just and litigated end at law from determining litigated issue on the award at equity.

The seniority rights impairment issue is settled, as to whether or not the appellee impaired the appellant's seniority rights, they did. Confirming the award for judgment and damages in the proper amount is what represents the appropriate end at law and is not settled.

The appellant has been arguing to have judgment on the award, not whether the defendant impaired his seniority rights or not.

But, rather than make appropriate judgment, the District Court dismissed the award's confirmation, claiming the appellant is re-arguing issue, when he obviously seeks judgment on the award with damages.

RESPONSE TO: III. Counter Statement of Questions Presented

Although abuse of discretion has been raised in the appellant's brief, the appeal is from a F.R.C.P. 59(e) motion which states:

"Appellate Courts may consider...and treat appeal as being from underlying judgment"...(Peabody Coal Co. v. United Mine Workers (1973, CA 6 Ky) 484 F.2d 78, 84 BMA LRRM 2249 73 CCNLC 1396217 FR Serv. 2d 1276 cases.

173

UNITED STATES COURT
OF APPEALS
FOR THE SEVENTH CIRCUIT

File No. 88-1381

KENNETH C. GRIMES, APPELLANT

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
APPELLEE

Appeal From The United States
District Court
Southern District Of Indiana
Evansville Division

Honorable Gene Brooks
Presiding Judge

PETITION FOR REHEARING

February 9, 1989

KENNETH C. GRIMES
Pro Se For Appellant
621 East Gum Street
Evansville, IN 47713
1-812-423-1600

PETITION FOR REHEARING

Introduction

Comes now the Appellant to seek a rehearing of Case No. 88-1381, where this court on January 27, 1989 affirmed the District Court of Southern Indiana's Judgment to dismiss the Plaintiffs motion to confirm Award 7956 Docket No. 7776 of the Railroad Adjustment Board, second division.

Materialk to this brief are the following citations: (1) Thorgaard Plumbing & Heating Co. Ind., v. County of King, State of Washington, 426 P. 2d 828. (2) Lesser Towers, Inc. v. Roscoe Ajax Construction co. 258 T. Supp. 1005 (1966).

ARGUMENT

RESPONSE TO: "Resjudicata, or claim preclusion, operates as a bar to litigants when there has been a final judgment on the merits in a prior action, and there is as identity of the cause of action and the parties in the two

suits. Lee v. City of Peoria, 685 F. 2d 196, 199 (7th Cir. 1982). The decision in Grimes, 583 F. Supp. 642, was final, on the merits, and between the same parties as this action. The major issue in this case therefore is whether the causes of action in the two suits are the same."

The court committed an error of law in ruling over the Plaintiffs objection, as stated in p. 12 footnote 69 of the main brief but, the citations were not known beyond the statement in the main brief because of typographical error. The same is true in the remaining responses.

Contrary to the conclusion, resjudicata or claim preclusion operates as a bar when there are two suits. This is a single suit for specific performance, which includes the petition for confirmation of the Award. (see Lesser Towers, Inc. v. Roscoe-Ajax Contruction Co., 258 F. Supp. 1005 (1966) at (1).

It is held: "Confirmation of an arbitration Award is not a separate proceeding."

Further, as held in (Thorgaard Plumbing & Heating Co. v. County of King Wash. 426 P. 2d 828) and contrary to the above response "a right of action" is not synonymous with a "cause of action" but is a right to enforce a cause of action by suit, where a right of action is the right to pursue a judicial remedy. Whereas a cause of action is based on the substantive law of legal liability."

In the instant case, there is but one suit on specific preformance where Plaintiff has pursued judicial remedy by way of his right of action. There has been a final judgment in the District Court's Dismissal of Proceeding to Confirm, contrary to this act is the law and grounds for dismissal, which state "dismissal of a proceeding may, however, be granted only when the court determines that the petitioner or respondent is not bound by the

arbitration Award and is not a party to the arbitration>" (see Cal. Horn v. Garewitz, 67 Cal. Rptr. 791, 261 C.A. 2d. 255). The District Court never demonstrated this to being the case, because to do so would be in consistent with the finding of seniority rights impairment.

Thus in the absence of two suits and a valid final judgment the above case for res-judicata must fail. As shown earlier in Plaintiff's main brief confirmation on p. 12 the procedure is not separate, because all controversies grew out of this single unit for specific performance from a arbitration statute and contract.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of the Master Mechanic
Evansville, Indiana

Bulletin No. 881

Date March 23, 1981

NOTICE TO ALL EMPLOYEES CONCERNED:

The following position(s) will be
abolished effective 7:00 AM, March 30, 1981,
due to decline in business.

Position	Days of Assignment	Hours of Assignment
Electrician Apprent. (K.C. Grimes, incumbent)	Mon. Thru Fri. off Sat. & Sun.	7 AM to 3 PM

Please be governed accordingly.

B. R. Montgomery
Master Mechanic

cc: Local Chairman--B. E. Knight

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of the Master Mechanic
Evansville, Indiana

March 23, 1981

Bulletin No. 882

NOTICE TO ALL EMPLOYEES CONCERNED:

The following employee in furloughed
effective 7:00 AM, March 30, 1981, due to
deadline in business:

K.C. Grimes, ID 422219, electrician
apprentice, seniority date February 26, 1976.

B. R. Montgomery
Master Mechanic

cc: Bulletin Boards
K.C. Grimes
Local Chairman

NATIONAL RAILROAD ADJUSTMENT BOARD
220 SOUTH STATE STREET
CHICAGO, ILLINOIS 60604

September 11, 1979

. AWARD 7956 L&N-EW

Mr. Kenneth C. Grimes
1240 Hatfield Drive
Evansville, Indiana

Dear Sir:

This will acknowledge receipt of your letter, wherein you appeal any and all aspects of Award 7956 that does not make you whole with respect to your wages for the period Sept. 21, 1976 to July 20, 1979.

Please be advised that the Railway Labor Act, Section 3 First (m) states in part "**** the awards shall be final and binding upon both parties to the dispute ***."

Very truly yours,

Executive Secretary
National Railroad
Adjustment Board

By Order of Second Division

rb

By /S/ Rosemarie Brasch
Rosemarie Brasch
Administrative Assistant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES,)	
Plaintiff)	
)	
.vs.	)	CAUSE NO.
	)	EV 81-130-C
LOUISVILLE AND NASHVILLE)	
RAILROAD COMPANY and)	
LOCAL 1353, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	
WORKERS,)	
Defendants)	

COMPLAINT FOR DAMAGES, DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

I. JURISDICTION

1. This action presents special Federal Questions and is instituted pursuant to 28 USC § 1331(b), 28 USC § 1343(1) and 28 USC § 1343(4). Jurisdiction is founded upon Section 301 of the Labor Management Relations Act, June 23, 1947, c. 121, Title III, Section 301, 61 Stat. 156, as amended; Section 151 et seq. of the Railway Labor Act. 1934, 48 Stat. 1185, 45 USC § 151 Chapter 8, as amended; Title VII

of the Civil Rights Act of 1964, 78 Stat. 253, 42 USC § 2000e et seq.; and 42 USC § 1985, without respect to the amount in controversy and without regard to the citizenship of the parties.

II. NATURE OF THE PROCEEDING

2. This is a proceeding for back pay and benefits, a Declaratory Judgment as to the Plaintiff's rights and for a permanent injunction enjoining the Defendants from retaliating against the Plaintiff in violation of Section 704(a) of the Civil Rights Act of 1964, 42 USC § 2000e-3(a), discriminating against the Plaintiff because of his race or color with respect to his job classification, seniority status, apprenticeship status, assignments, promotions, and terms, conditions and privileges of employment and from conspiring together to do so.

3. This is also an action

Brought by an employee wrongfully discharged from his employment by his employer, Louisville and Nashville Railroad Company (hereinafter "Company") in violation of the collective bargaining agreement then in force and for violations continuing to occur with respect to that employee subsequently.

4. This is also an action being brought by an employee union member against his collective bargaining representative, Local 1353, International Brotherhood of Electrical Workers, (hereinafter "Union") for failure of the "Union" to fairly and lawfully represent this employee.

III. THE PARTIES

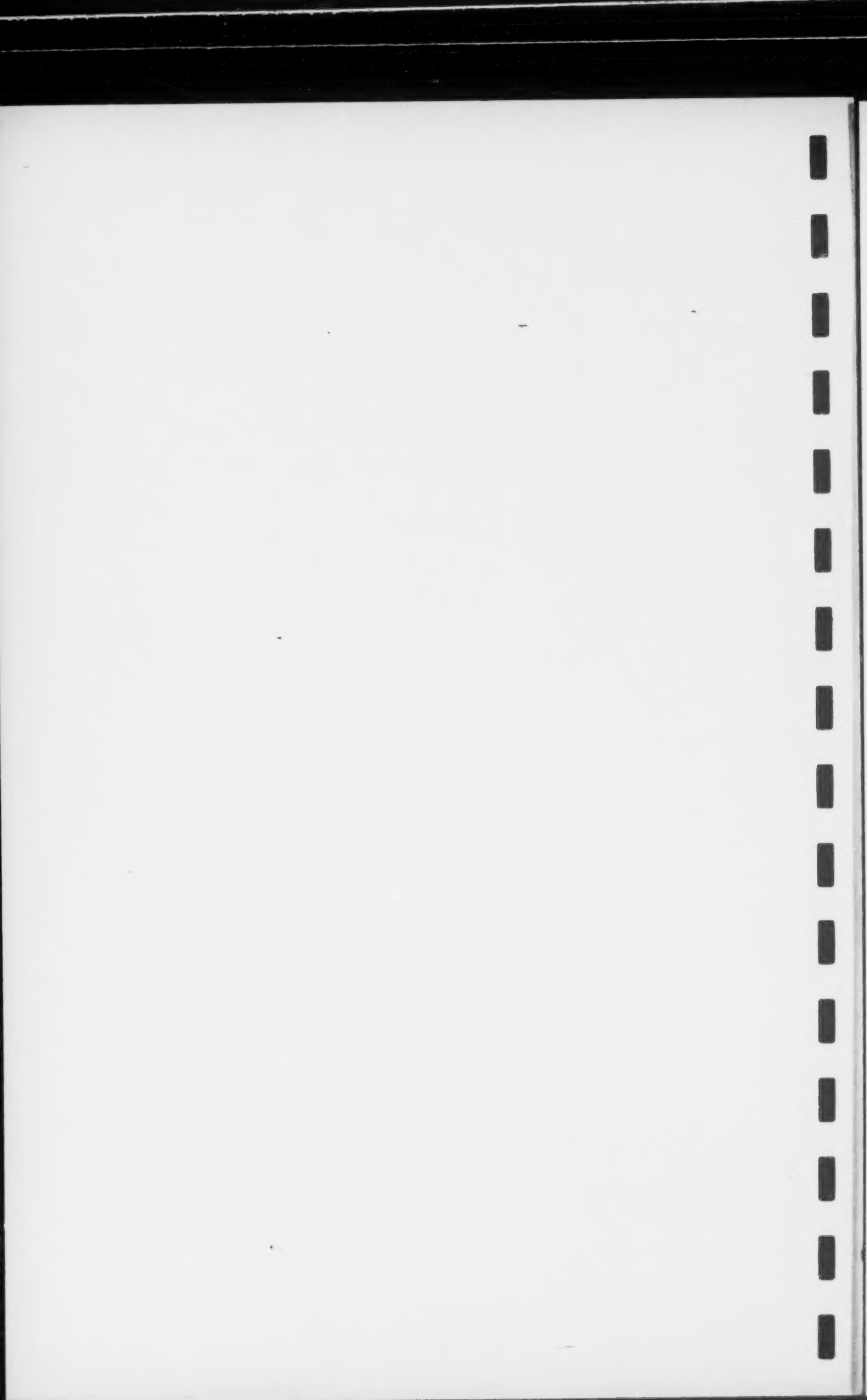
5. The Plaintiff is a Black Male individual residing in the City of Evansville, County of Vanderburgh, State of Indiana who at all times material to this

claim was employed by the defendant, "Company" or was a wrongfully discharged employee of the "Company" and was a member of the "Union".

6. The Defendant, Louisville and Nashville Railroad Company" (Company") is a corporation maintaining its principal place of business at 908 West Broadway, Louisville, Kentucky 40203 and is doing business in the State of Indiana.

7. Defendant "Company" is an employer within the meaning of 42 USC 2000e-(b), 45 USC Sec. 151 and is engaged as a carrier within the meaning of 45 USC Sec. 151 in an industry affecting interstate commerce within the meaning of 42 USC Sec. 2000e-(h), and has maintained fifteen (15) or more employees at all times relative to this action.

8. Defendant, Local 1353, International Brotherhood of Electrical Workers ("Union") is an unincorporated association, maintaining a principal place of business at 6804 Tropic Court, Louisville, Kentucky 40291.



9. Defendant, "Union" has at all times relevant to this action, a total membership of over twenty-five (25) employees and is the bargaining representative for, and has entered into a collective bargaining agreement with Defendant "Company" concerning the terms and conditions of employment of railway employees working out of the Howell Yards in the City of Evansville, Indiana.

10. Defendant, "Union" is a labor organization within the meaning of 42 USC Sec. 2000e-(d) and is a named defendant herein as a necessary party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

IV. FACTUAL ALLEGATIONS

11. Beginning on February 26, 1976 and continuing until September 21, 1976, the Plaintiff was an employee of the Defendant "Company" and a dues-paying member of Defendant "Union".

(a) that the penalty of dismissal under the circumstances was excessive, (b) that the Claimant (Plaintiff herein) was to be reinstated to service with his seniority rights unimpaired, but (c) denied him compensation for the three years lost wages and benefits since the date of his dismissal; such decision was the final step in the administrative remedies required to be exhausted under the guidelines established by the "Agreement" and the Railway Labor Act.

24. From September 22, 1976, when the Plaintiff was wrongfully suspended and later discharged, until July 9, 1979, when the Plaintiff was reinstated to service, Plaintiff was unable to obtain other employment and received no income.

25. When Plaintiff was reinstated to employment with the "Company", said reinstatement was to a classification and pay scale which were inferior to the

12. During most of this period, Plaintiff was an Apprentice Electrician, Upgraded, and was the only Black male in

16. On the occasion of his suspension and his discharge and at all relevant times herein, Plaintiff, in each instance immediately advised Defendant "Union" of his grievances and requested that they enforce his rights under the "Agreement".

17. Although "Union" provided Plaintiff with representation at his discharge hearing, said representation was of poor quality by a Union Steward who was unprepared and was admittedly without experience and training.

18. Despite Plaintiff's requests to the "Union", Plaintiff discovered that only by applying constant pressure upon the "Union" officials did the "Union" react by pursuing the initial steps of the above-described contractual grievance procedure.

his classification who was assigned to the Howell yards located in Evansville, Indiana.

13. During the period of Plaintiff's employment and subsequent thereto, Plaintiff was subject to the terms, conditions and provisions of a Collective Bargaining Agreement between "Company" and "Union" dated September 1, 1943, with revisions thereto, a true and correct copy of which is attached hereto and marked "Exhibit A", hereinafter referred to as "Agreement", which includes the following sections:

Rule 39(f) which provides that :

"An apprentice shall not be dismissed except for just and sufficient cause before completing his apprenticeship."

Rule 34 which provides that :

"No employee shall be disciplined without a fair hearing by designated officers of the carrier...."

And that:

"If it is found that an employee has

been unjustly suspended or dismissed from service such employee shall be reinstated with his seniority rights unimpaired, and compensated for wage loss, if any, resulting from said suspension or dismissal."

Rule 29(a) which provides that:

"Seniority of each employee covered by this agreement will begin from the date and time the employee starts to work."

Rule 26(a) which provides that:

"When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 29 to govern...."

14. On or about September 22, 1976, Plaintiff had a minor altercation with one L. J. Fieber, his temporary supervisor, over the installation of a switch. On that date, Plaintiff was unlawfully and unjustifiably suspended.

15. On or about September 27, 1976, the Defendant "Company" terminated Plaintiff's employment and advised the Plaintiff that he was being discharged for insubordination.

19. Despite the fact that the Plaintiff was suspended from service on September 22, 1976, and dismissed on

September 27, 1976, and despite Plaintiff's continuing pursuit of this matter and continuing pressure on the "Union", the Plaintiff's appeal did not come before the National Railroad Adjustment Board until almost three (3) years after the incident, though such appeal should have been heard within nine (9) months from the date of the last denial by the "Company".

20. This unlawful delay which caused substantial hardship on the Plaintiff's already overburdened financial condition was in no way caused by or at the instance of the Plaintiff; rather, this delay was caused by or instigated, either solely or jointly by the "union" and/or the "Company" to further damage the Plaintiff and deprive him of his rights.

21. Despite Plaintiff's protestations to the "Union" that these delays and improper representation were greatly endangering the health and

well-being of the Plaintiff and his family, who, without the Plaintiff's income, were able to "enjoy" only the barest necessities of life, "Union" took no action to pursue the timely resolution of Plaintiff's grievance.

22. Following the procedure set forth in the "Agreement" in Article V of Appendix D thereto and the Railway Labor Act (45 USC § 151 et seq.), the Plaintiff timely pursued his administrative remedies, culminating in his appeal before the Second Division of the National Railroad Adjustment Board in June, 1979.

23. That on or before the 13th day of June, 1979, almost three (3) years after his wrongful dismissal, the National Railroad Adjustment Board, Second District, rendered a Decision and Award, numbered 7956, Docket No. 7776, a true and correct copy of which is attached hereto and marked "Exhibit B"; said Board's decision being:

position and pay scale which he had held prior to his wrongful discharge, in violation of Section 34 of the "Agreement" ("Exhibit A" hereto) and contrary to the Award of the National Railroad Adjustment Board.

26. Plaintiff's reinstatement was in an inferior position on the seniority roster and apprenticeship program; employees hired later than Plaintiff were in higher positions and were promoted over Plaintiff, in direct violation of Section 29(a) of the "Agreement" and the Award of the National Railroad Adjustment Board.

27. Defendant "Union" again failed to represent the Plaintiff in pursuit of his seniority rights under the "Agreement" and under the terms of Award of the National Railroad Adjustment Board, damaging Plaintiff further.

28. On or about March 16, 1981, Plaintiff filed a charge of discrimination

against the Defendant "Company" with the Equal Employment Opportunity Commission alleging that the Defendant "Company" had discriminated against the Plaintiff because of his race. Thereafter, the "Company" retaliated against the Plaintiff for having filed such charge by, on March 30, 1981, unlawfully and maliciously laying off the Plaintiff, the only Black in the trade and the only person to be so furloughed.

29. At the date of filing, Plaintiff is still laid off, and the Defendant "Union" continues to fail to represent the interests of the Plaintiff, damaging him still further.

V. PLEADING PARAGRAPH 1

The Plaintiff, for his first claim, alleges:

30. Paragraph One through Twenty-Nine are hereby incorporated in and made a part of Pleading Paragraph 1.

31. The suspension and discharge of the Plaintiff by the Defendant

"Company", as well as their reinstatement of Plaintiff in an inferior position and at an inferior salary, respect to his position and salary at date of discharge and his subsequent layoff represent direct blatant violations and breaches by Defendant "Company" of the aforesaid "Agreement", and especially of Rule 39(f) relating to discharge, Rule 34 relating to discipline and reinstatement, Rule 29(a) relating to seniority, and Rule 26(a) relating to layoffs.

VI. PLEADING PARAGRAPH 2

The Plaintiff, for his second claim, alleges:

32. Paragraphs One through twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 2.

33. The arbitrary and bad faith failure of the Defendant "Union" to fairly, adequately, and competently, properly and timely represent Plaintiff without bias, in

regard to his unlawful suspension, discharge and furlough, and to remedy the inequity apparent in the manner of his reinstatement represent blatant and willful breaches of the Defendant "Union's" duties to fairly represent the Plaintiff, which duties arise under and constitute a violation of the statutory mandate of the National Labor Relations Act and of the "Agreement".

VII. PLEADING PARAGRAPH 3

The Plaintiff, for his third claim, alleges:

34. Paragraphs One through Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 3.

35. The unlawful and discriminatory employment practices of the Defendants, and each of them, have deprived the Plaintiff of the same right to employment opportunities as are enjoyed by white persons. Such practices are

degrading to the Plaintiff and cause him and his family severe financial, mental and emotional distress. Such practices of invidious racial discrimination against the Plaintiff serve to stigmatize him solely on the basis of his race.

36. The racially discriminatory employment practices of the Defendants and their retaliation toward the Plaintiff were undertaken by the Defendants, and each of them, consciously, intentionally, and maliciously for the invidious purpose of discriminating against the Plaintiff due to his race, and had as their object to deprive him of his civil right to equal opportunity in violation of the Civil Rights Act of 1964.

VIII. PLEADING PARAGRAPH 4

The Plaintiff, for his fourth claim, alleges:

37. Paragraphs One through Twenty-Nine are hereby incorporated and

Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 4.

38. The racially discriminatory practices of Defendants, and each of them, as described herein, as well as the retaliation of "Company" combined with "Union's" failure to defend and protect Plaintiff's rights therefrom, were undertaken consciously, intentionally and maliciously for the invidious purpose of discriminating against the Plaintiff solely on the basis of race.

39. The practices and policies of the Defendants "Union" and "Company" constitute a conspiracy, the intentional and malicious object thereof being to deprive Plaintiff of his civil rights to equal employment opportunity at the Louisville and Nashville Railroad Company.

40. Each of the unlawful employment practices, as described herein and the retaliation against Plaintiff

herein, were implemented intentionally by Defendants, and each of them, in furtherance of this unlawful conspiracy, causing irreparable injury to Plaintiff, including, but not limited to: loss of equal promotional opportunity, salary, wages, fringe benefits and pension differentials, as well as causing extreme emotional anguish and mental distress to Plaintiff.

IX. PLEADING PARAGRAPH 5

The Plaintiff, for his fifth claim, alleges:

41. Paragraphs One through Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 5.

42. Pleading Paragraph 5 is an Appeal pursuant to 45 USC § 151 et seq., from the Award of the National Railroad Adjustment Board, Second Division, numbered 7956, Docket No. 7776 ("Exhibit B" herein) insofar as it denies Plaintiff compensation

for lost wages, benefits and increments from September 22, 1976, through July 7, 1979.

43. The National Railroad Adjustment Board found that there were mitigating and extenuating circumstances such as the relative lack of experience of both parties to the underlying incident and that, this being the case, "the discipline of dismissal was excessive..."

44. Having made said findings, the National Railroad Adjustment Board, in a decision contrary to the evidence, proceeded to impose a harsh, unfair, and discriminatory penalty upon the Plaintiff by failing to compensate him for his thirty-seven (37) months without wages or benefits and during which time he suffered extreme financial, mental and emotional distress.

45. Section 34 of the "Agreement" ("Exhibit A" hereto) provides a specific,

definite and exclusive remedy for unjust suspension or dismissal of an employee as set forth in Rhetorical Paragraph 13 herein.

46. The Order of the National Railroad Adjustment Board denying Plaintiff compensation for thirty-seven (37) months of losses, in direct contradiction of its own findings as well as of the mandates of the Railway Labor Act (45 USC § 151 et seq.) is excessive, harsh, discriminatory, arbitrary, capricious and is in complete disregard for the bargained-for explicit and unambiguous provisions of the "Agreement" ("Exhibit A" herein).

X. CONDITIONS PRECEDENT

47. Plaintiff has complied with all conditions precedent to all causes of action herein.

XI. IRREPARABLE INJURY

48. The Plaintiff has no total, plain, adequate or complete remedy at law

to redress the wrongs alleged herein and a suit for back-pay and benefits, and injunctive and declaratory judgment is his only means for securing adequate relief. Plaintiff is now suffering and continues to suffer irreparable injury from the Defendant's unlawful practices as set forth herein unless enjoined by this Honorable Court.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court:

A. Enter a Declaratory Judgment that the practices of the Defendants "Company" and "Union", in the acts, practices, policies and procedures complained of herein have violated and continue to violate the rights of Plaintiff as secured by Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e et seq., and 42 USC § 1985(3).

B. Grant to the Plaintiff a

preliminary and permanent injunction enjoining the Defendants and their agents, successors, employees, attorneys and other representatives acting in their behalf, from engaging in any employment practice or policy which discriminates against the Plaintiff on the basis of his race.

C. Order that a preliminary and permanent injunction issue directing that Defendant "Company" comply with the decision of the National Railroad Appeals Board and restore to him all of his seniority rights and apprenticeship status unimpaired, and directing full and complete compliance with the said decision and award as to those provisions.

D. Enter a Declaratory Judgment, vacating, setting aside and declaring void and unenforceable that section of the Award of the National Railroad Adjustment Board, number 7956, Docket No. 7776, insofar as it constitutes an excessive penalty and that

it unjustly, arbitrarily and discriminately denies to Plaintiff his lost wages, benefits and increments for the period from September 22, 1976, until July 9, 1979.

E. Grant to the Plaintiff a judgment against the Defendant "Company" for all wages, benefits and increments which the Plaintiff would have received had he not been unlawfully terminated; reimbursement for loss of promotional opportunity, apprenticeship experience and education, and other benefits which he might have received had he not been discriminated against.

F. Grant to the Plaintiff compensatory damages in the amount of One Million Dollars (\$1,000,000.00), and punitive damages in the amount of Three Million Dollars (\$3,000,000.00).

G. Allow to Plaintiff an allowance and reimbursement for all attorney fees and expenses occasioned by

Defendant's deliberate and malicious policies and practices, and Plaintiff's costs herein.

H. Grant to Plaintiff such further and alternative relief as the Court shall deem just and reasonable in the premises.

Respectfully Submitted,

KENNETH C. GRIMES

By _____
KATHARINE VAN OST
Attorney for Plaintiff

JURY DEMAND

Plaintiff respectfully requests
trial by jury of those issues triable to a
jury in this action.

Respectfully Submitted,

KENNETH C. GRIMES

By _____

KATHARINE VAN OST
1018 Southern Securities Bldg.
329 Main Street Walkway
Evansville, Indiana 47708
Telephone: 812/242-3518

Attorney for Plaintiff

- 3/26/82 Deft. IBEW Local 1353 fi Motion for Summary Judgment, Statement of Material Facts as to Which There is No Genuine Issue, Memorandum of Points and Authorities in Support of Motion for Summary Judgment; c/s
- 4/2/82 Deft., L & N RR Company, fi Motion for Summary Judgment, Memorandum in Support thereof and c/s. - Deft. also tenders Proposed Findings of Fact and Conclusions of Law.
- 5/3/82 Deft., Internat'l Brotherhood of Elect. Workers Local 1537 fi mo. to Strike Jury Demand; Memorandum in support thereof and c/s.
- 5/5/82 Deft., L & N RR Co., fi Joinder in mo. of deft., Internat'l Brotherhood of Elect. Workers Local 1537, to Strike Jury Demand; Memorandum in Support thereof and c/s.
- 5/6/82 Mag. Endsley enters order on pre-trial held 4/5/82. In light of the pltf's counsel's Mo. to withdraw her appearance for the pltf., the Court granted the pltf. until 5/5/82 to fi a response to deft.
L & N was granted until 5/11/82 to fi a reply to pltf's response to deft L & N's Mo. for Summary Judgment. By agreement of parties the Court ORDERED and DECREED that the pltf taken nothing by way of VII Pleading

Para. 3 of Complaint with respect to the deft., Local 1353, etc. and that said deft. recover its costs laid out and expended with respect to said Count of pltf's complaint. Discovery to be completed by 10/5 except for the purpose of taking depositions for the purpose of trial. Deft., Local 1353, renewed its objection to pltf's request to trial by jury with respect to VI Pleading Para. 2 alleging breach of Union's duty of fair representation, it was agreed and the Court ordered that the pltf. respond within 15 days to said deft's objection to Request for trial by jury and in the event the parties could not agree, the Union was ordered withing 30 days to fi a brief in support of its position on its objection to the Request for Trial by Jury on VI pleading Para. 2. cc: attys. and pltf.

- 6/16/82 Pltf. fi Mo. for ext. of time in which to respond to motion of deft L & N Railroad Co. for Summary Judgment and mo. of deft., Local 153 to Strike Jury Demand; c/s.
- 6/25/82 Pltf. fi Response to Defts' Mo. to Strike Jury Demand; c/s.
- 7/9/82 Hearing held on defts' motion for summary judgment as to Counts 1,3,4 and 5 of the complaint. Arguments of

counsel are heard. Defts. enter motion to strike jury claim. Court to rule on these matters.

- 2/10/82 Court enters Order and Memorandum on defts' Motion for Summary Judgment. Court GRANTS Mo for summ judg. as to appeal of decision of National Railroad Adjustment Board. Court GRANTED summ. judg as to para. one in favor of deft. Railroad; summ judge as to para. two GRANTED in favor of deft Union; summ judg as to para three GRANTED in favor of Union. With regard to deft Railroad, motion GRANTED in part and DENIED in part. Pltf may pursue against Railroad only on his claim of retaliation in violation of Title VII, 42 USC 2000 et seq.; Summ judg. as to para. four GRANTED in favor of both defts.; summ judge as to para. five GRANTED in favor of deft. Railroad. cc:attys O.B. Vol. 18, P. 1 Entered 2/13/84
- 6/22/84 Pltf. fi Response to Strike Demand For Jury Trial; c/s, Pltf. also fi Amended List of Witnesses and Exhibits;c/s
- 7/26/84 Preceding commencement of trial, pretrial conf. is conducted in Chambers.

Comes now parties, pltf appearing pro se and deft by counsel, stating they are ready to proceed, trial of cause is commenced without intervention of jury.

Evidence on behalf of pltf is commenced and concluded. Pltf rests. Deft orally moves for directed verdict. Court takes matter under advisement.

Evidence on behalf of deft is commenced and concluded. Deft rests.

Deft orally renews motion for directed verdict.

Court will rule on this matter.

Court is adjourned.

THE COURT: Do one of you want to say something about the jury trial while you are here?

MR. WOLLY; Actually, we have pending before, Your Honor, a motion to strike the jury demand on the duty of fair representation claim. I would note for the Court before addressing that, that I don't think there is any dispute that there is no entitlement to a trial by jury on the Title VII claim. We do not dispute the entitlement to a jury on the 1985 claim. I was mistaken when I referred to it as a 1981 claim earlier in this argument here. It is indeed a 1985 claim. On the duty of fair representation claim, I think we have addressed that now in our briefs, the cases that we have relied on here and to expand on it would be merely reading those cases to Your Honor, and I don't feel it is necessary.

THE COURT: Do you have anything further on that, Mr. White?

MR. WHITE: No, I don't have, Your Honor.

THE COURT:

Mr. Stayman, do you want to say anything on that?

MR. STAYMAN: No, Your Honor. I think the briefs are adequate - more than adequate.

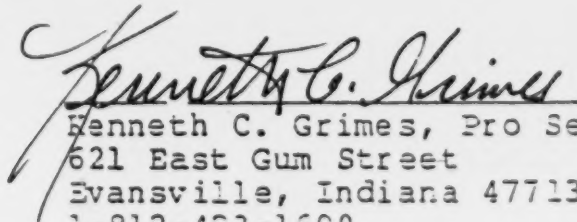
CERTIFICATE OF MAILING

The undersigned, counselor pro se, hereby certifies that he caused to be mailed, postage pre-paid, first class, or personally served, on this 4th day of December, 1989, the following copies of this Appendix:

Forty (40) copies to
Clerk, United States Supreme Court
Washington, D.C. 20543; and

Three (3) copies to
Attorney Galen J. White, Jr.
Boehl, Stopher, Graves & Deindoerfer
United Kentucky Bank Bldg.
One Riverfront Plaza
Louisville, Ky. 40202
Telephone 1-502-589-5980;

Three (3) copies to
Attorney F. Wesley Bowers
Bowers, Harrison, Kent & Miller
Fourth Floor, Permanent Savings Bldg.
Evansville, Ind. 47708
Telephone 1-812-426-1231.


Kenneth C. Grimes, Pro Se
621 East Gum Street
Evansville, Indiana 47713
1-812-423-1600
Counsel as Pro Se.